**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM**
**CHAMBER**

**Case No: UI-2023-000809**
**First-tier Tribunal No:**
**PA/50643/2022**
**IA/01830/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 25 June 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

**Between**

**KAZI MIZANOOR RAHMAN**
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr M Mustafa, Counsel, instructed by KPP Barristers
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

**Heard at Field House on 31 May 2023**

**DECISION AND REASONS**

1. The Appellant is a national of Bangladesh born on 15 January 1982. He entered the UK on 5 May 2009 as a working holidaymaker with leave valid until 16 April 2011. He asserted that if he had to return to Bangladesh, he would face a forced marriage, but this assertion was rejected by the Secretary of State. The Appellant subsequently claimed asylum on 5 June 2020 and this application was refused on 14 February 2022. In the meantime, the Appellant had met his partner, with whom he had an Islamic marriage on 25 August 2021

and a ceremony in a civil registry office on 10 February 2022. The Appellant's wife has a son from a previous marriage who was born in 2010. She also conceived a child by the Appellant who died shortly after her birth on 20 August 2022.

2. The Appellant appealed the refusal of asylum and also raised his Article 8 human rights claim in a Statement of Additional Grounds. In a Respondent's review dated 26 July 2022, the Respondent consented to consider the new human rights aspects and the appeal came before First-tier Tribunal Judge Burnett for hearing on 24 January 2023. In an undated decision and reasons, promulgated on 7 February 2023, the judge dismissed the appeal both in respect of asylum and human rights.

3. The Appellant sought permission to appeal to the Upper Tribunal on three grounds:

   (i) in relation to the issue of the delay in the Appellant raising his asylum claim which the judge treated as determinative of his credibility when the Appellant had given a cogent explanation as to why he did not seek asylum earlier and this is because the threat to him materialised in May 2020 and he acted in reasonable time in registering his claim in June 2020;

   (ii) the judge failed to give sufficient weight to written letters from Save Bangladesh group and from Saiful Islam and these documents verified which could have been done;

   (iii) the judge erred in failing to give adequate consideration to section 55 of the BCIA 2009 and Article 8 of the Human Rights Convention with regard to the Appellant's stepson. It was asserted the judge speculated in finding at [50] and [58] that the child could stay in Bangladesh from time to time; that there was evidence at [50] in finding that he did not have enough information regarding the child's father and his involvement to make any concluded view as to disruption to the child given the judge's acceptance that the child's mother was his primary carer. It was further asserted that there was evidence in the form of a letter from the child's school, oral and written evidence from the Appellant and his wife, and photographic evidence of his relationship with his stepson, yet the judge failed to give appropriate consideration of this relevant evidence in concluding that the Appellant did not have a genuine and subsisting parental relationship with the child. Reference was made to case law which sets out that the conduct of the parent should not be used against the child: ZH (Tanzania) [2011] UKSC 4, Zoumbas [2013] UKSC 74, Kaur [2017] UKUT 14 (IAC), MK (best interests of child)

India [2011] UKUT 00475 and JO (section 55 duty) Nigeria [2014] UKUT 00517 (IAC).

4. Permission to appeal was granted by Upper Tribunal Judge Reeds in a decision dated 24 April 2023 on the following basis:

> *"1. There are 3 grounds of challenge; dealing with ground 3 first, it is arguable that the First-tier Tribunal Judge failed to consider the circumstances of the relevant child in the overall context of the appellant's article 8 claim. In particular, the findings made concerning where the child could reside and the issue of family life being maintained, appear to be contradictory; the First-tier Tribunal Judge found that it was not in the best interest of the child to leave the UK (paragraph 50) but also found that the appellant's wife could live in Bangladesh (paragraph 58). The grounds refer to the evidence of the relationship between the appellant and his stepson and it is arguable that there was evidence before the First-tier Tribunal Judge that the relevant child was cared for by the appellant and his wife jointly (witness statement paragraph 28 and witness statement paragraph 6 and 7 of appellant's wife) which was not taken into account, and this had an impact on the assessment of the article 8 claim and of the issue of parental responsibility (under both EX1 and S117B).*
>
> *2. The other 2 grounds that concern the issue of delay and the assessment of the credibility of his claim to be at risk as a result of his political opinion (and sur place activities) appear to be weaker, but I do not restrict the grant of permission".*

5. The Respondent submitted a Rule 24 response on 15 May 2023 which submitted *inter alia* at 3:

> *"3. The SSHD submits that the first two grounds lodged have no merit. The FTTJ provided adequate reasons for rejecting the appellant's protection claim taking into account issues extending beyond s.8 matters as part of a holistic assessment. Likewise, the FTTJ had due regard to the letters referred to in the grounds, affording them little weight in a rational assessment. It is submitted that these grounds amount to no more than disagreement.*
>
> *4. In relation to Article 8 and S.55. the FTTJ considered the domestic situation [19-20] and heard evidence from the partner and appellant. The FTTJ made a finding in relation to best interests based on what was before the Tribunal, and also noting what was not. It was perfectly open to the*

*FTTJ to consider the limited impact on the child, should he accompany his mother (partner of the appellant) to stay with the appellant from time to time. At [52] the FTTJ finds that the appellant has failed to establish that he has a genuine and subsisting parental relationship (emphasised) as there was little evidence he has any parental responsibility. The grounds draw attention to the letter from the school (AB49) - this makes no mention of the appellant and refers only to the partner as the parent. Likewise there is no mention of the appellant in the school report. Beyond a brief mention in the witness statements there is nothing beyond that. The FTTJ was entitled in those circumstances, having considered that the mother has been a primary carer of the child since birth that whilst the appellant may assist with care he has no parental responsibility. In a detailed assessment of proportionality, the FTTJ taking into account public interest provisions was entitled to conclude that family life could be continued in Bangladesh, and that separation whilst an EC application is made is also not a disproportionate expectation. The grounds do not challenge this view on any reading".*

*Hearing*

6. At the hearing before the Upper Tribunal, Mr Mustafa on behalf of the Appellant raised two preliminary matters. Firstly, he served a copy of the Tribunal's decision in RK ("parental responsibilities") [2016] UKUT 00031 (IAC). He also sought confirmation that the Upper Tribunal had received the Rule 15(2A) application and requested that a letter from the Appellant and his wife's GP dated 20 February 2023 be admitted. I indicated that the Tribunal had received the Rule 15(2A) application, however the letter from the Appellant and his wife's GP did not go to the issue of whether or not there was a material error of law in the judge's decision and reasons.

7. Mr Mustafa addressed ground 3 of the grounds of challenge first. He submitted that in order for the Appellant to have succeeded he had to establish that either he met the requirements of EX.1(a) or (b) of Appendix FM or section 117B(6) NIAA 2002, whether he had a genuine and subsisting parental relationship with a qualifying child and whether it was reasonable for that child to leave the UK. Mr Mustafa submitted that at [50] and [53] of the decision and reasons the judge accepted the reasonableness point in the Appellant's favour, however he found at [52] there was little evidence of parental responsibility and the Appellant's stepson's biological father was still on the scene.

8. Mr Mustafa submitted that the evidence that was before the judge in the form of witness statements and oral evidence from the Appellant and his wife was uncontested. He made specific reference to [28] of the witness statement of 21 June 2022 that the Appellant cares for and supports his stepson by collecting him from school and that they live together as a family unit. In his wife's statement also dated 21 June 2022 at [7] she said the Appellant is a fatherly figure for her son, that they get on really well and go out on trips together, and at [8] that her son is grateful for having the Appellant in his life and is actively involved in his life and care.

9. In supplementary statements from the Appellant and his wife dated 6 January 2023, contained in the supplementary bundle, these were written after they had lost their daughter aged 2 days and the Appellant refers to the fact that he, his wife and their son are devastated and grieving for this loss, and at [8] that the Appellant's stepson is saddened because he is a single child and had been excited to have a sister and that he was struggling to understand the loss. In her witness statement at [4] the Appellant's wife said that her son has bonded with the Appellant and looks up to him as his father and also refers at [7] to the pain of losing her daughter, and at [8] her difficulties as a consequence of grief in communicating with her son and therefore her gratitude that her husband is with her and caring for her son and that they have an excellent relationship.

10. Mr Mustafa submitted that there is no consideration of this evidence by the judge who had also failed to consider the letter from the stepson's school dated 19 July 2022 at X5 of the supplementary bundle. This records the Appellant as his stepson's stepfather.

11. Mr Mustafa then referred to the judgment in RK (op cit) at [43] and [45] and he submitted that the evidence before the judge showed that the Appellant had stepped into the shoes of a parent. He also submitted that whilst the Appellant's stepson had contact with his father, who was his biological parent, this was addressed at [45] of RK and that there may be situations where there is a persuasive factual matrix for a third parent. Mr Mustafa submitted that had the judge considered RK and the factual matrix he would have come to the view that the biological parent being on the scene did not preclude a parental relationship between the Appellant and his stepson and that this amounted to a material error of law.

12. As to EX.1(b) of Appendix FM, Mr Mustafa submitted that the judge made internally inconsistent findings at [53] finding both that there were no insurmountable obstacles to the Appellant's wife going to Bangladesh with him but also that it was not reasonable for her to leave her child behind. At [50] the judge found it was not reasonable to expect the Appellant's stepson to live with his

biological father, and at [58] that there was nothing to stop the Appellant's wife spending periods of time with him in Bangladesh and time with her child in the UK.

13. Mr Mustafa also briefly addressed grounds 1 and 2, albeit ultimately he accepted that even if these were made out he would be unable to show that the judge had materially erred in law in his assessment of the asylum claim as a whole.

14. In his submissions, Mr Lindsay sought to rely on the Rule 24 response. He submitted it was clearly for the Appellant to make out his case. On behalf of the Respondent, he did not accept that the evidence was not challenged because the Appellant's credibility was in issue. He submitted that there was no evidence of a relationship between the child and his biological father and there was nothing other than the Appellant's own assertions and those of his wife that there was a parental-like relationship between the Appellant and his stepson. He submitted that the question of whether or not a parental relationship exists is a mixed matter of fact and law and there was no evidence of direct parental input in this case. He submitted that the judge had considered the evidence and concluded that no parental relationship had been shown.

15. Specifically with respect to ground 3, Mr Lindsay submitted that this was no more than a sustained disagreement with a lawfully reached decision of the Tribunal. In relation to RK he relied on [3] of the headnote where it was held that it was not impossible for three people to have a parental relationship with a child but it was unusual. He submitted there was no basis for the judge to conclude that this was one of those unusual relationships and he gave reasons for this and he disputed that the Appellant had shown that he had stepped into the shoes of a parent.

16. Mr Lindsay submitted that there had been no effective challenge to the conclusion that the Appellant return to Bangladesh and apply for entry clearance, see Younas [2020] UKUT 129 (IAC) which is authority for a case involving a minor child that Chikwamba [2008] UKHL 40 holds good. Mr Lindsay drew the Tribunal's attention to the fact that Younas had also been raised in the Respondent's review before the Tribunal and had been upheld in Alam [2023] EWCA Civ 30 at [113]. In relation to [53], Mr Lindsay submitted there was no inconsistency. What the judge had found essentially is that bearing in mind the lack of evidence there was no reason why the Appellant's wife could not spend extended periods visiting him in Bangladesh and that she and her son could go during the school holidays. On the judge's findings Mr Lindsay submitted there was no interference with Article 8 family or private life and that any interference would be proportionate.

17. In relation to the other grounds, Mr Lindsay submitted that Mr Mustafa had sought to raise an additional point in relation to ground 2, the CPIN in respect of Bangladesh and its impact, but permission had not been granted in respect of that point and that there was no material error of law overall.

18. In his reply, Mr Mustafa pointed out that at [49] the judge accepted that the relationship between the Appellant and his wife was credible as distinct from his findings in relation to the asylum claim. Mr Lindsay intervened to draw attention to [47] which is a global negative credibility finding, however, I indicated and the parties accepted, that it is clear from the manner in which the determination is structured that the credibility finding relates to the asylum claim and that the judge did indeed accept that the relationship between the Appellant and his wife is genuine and subsisting.

19. Mr Mustafa submitted that the Appellant was recorded on his stepson's school record as his stepfather. He submitted that the *Chikwamba* point was a red herring. The Appellant's wife was unable to meet the financial threshold so following the case of Alam [2023] EWCA Civ 30, Chikwamba [2008] UKHL 40 does not apply. In terms of inconsistency, he drew attention to [53] and submitted that it is clear that were the Appellant to be removed there would be an interference with family life, given the acceptance that the relationship was genuine and subsisting.

20. I reserved my decision which I now give with my reasons.

*Decision and reasons*

21. I agree with the Respondent that there is no substance in Grounds 1 and 2 of the grounds of appeal and that the FtTJ provided adequate reasons for dismissing the Appellant's asylum appeal. However, I find there are material errors of law in the decision and reasons of FtTJ Burnett, essentially for the reasons set out in ground 3 of the grounds of appeal.

22. The FtTJ addressed the article 8 aspect of the claim at [49]-[60] of the decision and reasons and made the following findings:

    (i) "the appellant has a genuine and subsisting relationship with his wife [49];

    (ii) It would not be in the child's best interests to leave the UK [50];

    (iii) it would not be reasonable and might be considered to be harsh and have the potential to cause disruption to force this

child to now live with his biological father at this time. However, I do not have enough information regarding the child's father and his involvement to make any concluded view as to this this and any disruption [50];

(iv) the child is a British citizen and so cannot be compelled to leave the UK. There was nothing provided to show that the child could not go and live and stay in Bangladesh from time to time and live with his mother there if she chose to accompany the appellant. However this change to the daily life of the child would potentially need gradual change and an explanation provided to help the child manage this transition and to protect the child's welfare and best interests. I would note that this is speculation as the information regarding these relationships was sparse and there was no expert report [51];

(v) I do not accept that the appellant has a genuine and subsisting parental relationship with his wife's child as required by the immigration rules. There was little evidence that he has any parental responsibility … I conclude that although the appellant might assist with the care of the child, he has no parental responsibility for the child [52];

(vi) there would not be insurmountable obstacles for (the Appellant's wife) to go and live in Bangladesh with the appellant. However I have stated above that I do not consider that it would be in the child's best interest to go to Bangladesh and for the child to leave the UK permanently. The appellant's wife is the primary carer of the child and so I find it would not be reasonable to expect her to leave her child behind in the UK with the child's father at this time [53];

(vii) … I find there is nothing to prevent the appellant's wife spending periods of time with the appellant in Bangladesh and periods of time with her child in the UK [58]

(viii) the other option for this couple is for the appellant to go and make an application for entry clearance to return to the UK… I have carefully considered the case of Younas in forming my conclusion. I have also considered the very recent case of Alam and Rahman [2023] EWCA Civ 30 [59]."

23. I find there is inconsistency in the Judge's findings in that he finds at [53] both that it would not be reasonable or in his best interests to expect the Appellant's stepson to leave the UK permanently nor for him to be left behind with his biological father, but he also finds that there are no insurmountable obstacles to the Appellant's wife joining him in Bangladesh. On the Judge's findings, the fact that the

Appellant's wife cannot take her son to Bangladesh nor leave him behind in the UK would appear objectively to amount to an insurmountable obstacle to family life between the Appellant and his wife and would thus potentially meet the requirements of EX1(b) of Appendix FM of the Rules. Whilst the FtTJ found to the contrary, more in the way of reasons was required to justify that conclusion given his findings as to the best interests of the Appellant's stepson.

24. I note, moreover, that whilst the Judge rejected the argument that the Appellant had a genuine and subsisting parental relationship with his stepson, a finding that was disputed by Mr Mustafa, he made no finding as to whether or not he accepted that the Appellant has family life with his stepson. Given that this was clearly material to any proper assessment of the proportionality of the decision I find that the failure so to do is a material error of law.

25. I do not find that the fact that RK ("parental responsibilities") [2016] UKUT 00031 (IAC) holds that more than two persons can have parental responsibility makes a material difference to the question of whether or not there is a material error of law, given that the assessment is fact sensitive. The FtTJ cannot be blamed for not taking account of the decision in RK if it was not expressly raised and argued before him.

26. However, I do find that the FtTJ erred in engaging in speculation as to what he considered to be the absence of evidence at [50] and [51] of his decision and reasons. It was incumbent upon the Judge to make clear findings of fact and to elicit the evidence from the witnesses to assist him in that process. If he was unable to make a finding of fact on a material issue then that is what he should have stated, rather than speculate as to a possible outcome.

27. As to the argument that the Appellant could return to Bangladesh in order to make an application for entry clearance as a partner, it was not in dispute and the FtTJ found at [53] that there was no evidence that the Sponsor was able to meet the financial requirements of the Rules. The Court of Appeal per Laing LJ held *inter alia* as follows in Alam [2023] EWCA Civ 30:

> *"110. The core of the reasoning in Hayat is that Chikwamba is only relevant when an application for leave is refused on the narrow procedural ground that the applicant must leave and apply for entry clearance, and that, even then, a full analysis of the article 8 claim is necessary. If there are other factors which tell against the article 8 claim, they must be given weight, and may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance. I consider that, in the light of the later*

*approach of the Supreme Court to these issues, the approach in Hayat is correct …*

*113. Moreover, the Secretary of State did not refuse leave in either case on the ground that the appellant should leave the United Kingdom and apply for entry clearance. I accept Mr Hansen's submission, based on Hayat, that Chikwamba is only relevant if the Secretary of State refuses an application on the narrow procedural ground that the appellant should be required to apply for entry clearance from abroad. It does not apply here, because the Secretary of State did not so decide. Chikwamba is irrelevant to these appeals."*

28. There is no mention of the Appellant's wife and stepson nor any engagement with article 8 in the Respondent's refusal decision of 14 February 2022. The Respondent subsequently, in her review dated 26 July 2022, gave consent to the matter being raised at the Appellant's appeal, noting at [18] and [19] that the Appellant has not provided all the mandatory evidence that he can meet the requirements of a spouse if an application was made from abroad and reliance was placed on the decision in Younas [2020] UKUT 129 (IAC). I find that the issue was considered in the Respondent's review and it was thus open to the Judge to consider it. However, I further find that this aspect of the FtTJ's decision at [59] is undermined by the failure to undertake a full (and sustainable) analysis of the article 8 claim and proportionality assessment, with fully reasoned and consistent findings *cf.* Alam (op cit) at [110].

**Decision**

29. For the reasons set out above, I find material errors of law in the decision and reasons of the First tier Tribunal Judge. I remit the appeal for a further hearing *de novo* in the First tier Tribunal, confined to consideration of article 8 and Appendix FM of the Immigration Rules. The Judge's findings and reasons in respect of the asylum claim are preserved.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber) Date
18 June 2023