IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002455

First-tier Tribunal No:
HU/60050/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 21st of November 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Shahidur RAHMAN
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Terrell, Senior Home Office Presenting Officer
For the Respondent: Ms S Ferguson of Counsel instructed by Kalam Solicitors

Heard at Field House on 31 July 2024

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First Tier Tribunal Judge Byrne dated 29 April 2024 allowing the appeal of Mr Shahidur Rahman against a decision of the Respondent dated 14 August 2023 refusing leave to remain.

2. Although before me the Secretary of State is the appellant and Mr Rahman is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and Mr Rahman as the Appellant.

3. The issues before me are narrow, and in the circumstances I do not propose to rehearse the full details of the appeal. The pertinent facts are these:

(i) The Appellant, a citizen of Bangladesh born on 6 February 1988, was granted entry clearance valid from 16 November 2022 until 16 May 2023.

(ii) On 30 November 2022, pursuant to the entry clearance, she entered the United Kingdom with leave to enter as an Overseas Domestic Worker.

(iii) On 15 May 2023 the Appellant applied for further leave to remain based on family/private life.

(iv) On 17 June 2023 the Appellant married Andrea Da Costa (d.o.b. 9 February 1987), a Portuguese national settled in the UK.

(v) On 19 June 2023 the Appellant applied for leave to remain as a spouse on the basis of his marriage: this was treated as a human rights claim. (The application of 15 May 2023 was subsequently 'closed'; the latter application of 19 June 2023 appears to have been treated as a variation – in any event the Respondent accepted that the Appellant's application was in time.)

(vi) The Respondent refused the application with reference to the 'Eligibility, Immigration Status Requirements', specifically paragraph E-LTRP.2.1(b) of Appendix FM of the Immigration Rules – "*The applicant must not be in the UK – (b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé or proposed civil partner, or was granted pending the outcome family court or divorce proceedings*"

4. Further to the above, it is to be noted that the Respondent's 'reasons for refusal' included the following passages:

(i) "*You entered the UK on 30 November 2022 with Leave to Enter the UK (LTE) as an Overseas Domestic Worker valid from 16 November 2022 until 16 May 2023.*"

(ii) "*At the date of application, you were in the UK with LTE as an Overseas Domestic Worker valid from 16 November 2022 until 16 May 2023 which is for a period of 6 months or less.*"

5. The Respondent was otherwise satisfied that the application did not fall for refusal on grounds of suitability, and that the relationship, financial, and English language requirements were all met. The Respondent was not satisfied that paragraphs EX.1 or GEN.3.2. availed the Appellant.

6. It may be seen that the Respondent characterised the period of leave to enter as being "*valid from 16 November 2022 until 16 May 2023*", and evaluated this period to be "*a period of 6 months or less*".

7. On appeal the Appellant argued, amongst other things, that the period 16 November 2022 to 16 May 2023 was in fact a period of 6 months and 1 day, and as such the application did not fail under the Rules on the basis of 'immigration status'; there being no other basis of refusal under the Rule, the Article 8 proportionality assessment favoured the Appellant. **FB and Others (HC 395 para 284: "six months") Bangladesh [2006] UKAIT 00030** was pleaded in aid. (I will refer to this as Submission 1.)

8. It was also argued that because the Appellant had made an application for variation of leave prior to the expiry of his initial leave, he enjoyed statutorily extended leave pursuant to section 3C of the Immigration Act 1971 and this extended his initial period of leave yet further beyond 6 months by the date of the 'spouse' application made on 19 June 2023. (I will refer to this as Submission 2.)

9. These arguments were raised in the Appellant's Skeleton Argument. They were not directly addressed or otherwise answered in the Respondent's Review. The Respondent was unrepresented at the appeal hearing.

10. The First-tier Tribunal accepted both submissions: "*I find sense in the arguments made on behalf of the appellant. They have not been engaged with in any meaningful way by the respondent. I accept the arguments on behalf of the appellant.*" (paragraph 20). The appeal was allowed accordingly.

11. Although the Appellant had also advanced evidence and arguments in respect of Article 8 beyond the issue of 'immigration status eligibility' under the Rules, the First-tier Tribunal made no express findings in this regard, and did not offer any analysis beyond finding "*sense*" in Submissions 1 and 2.

12. The Respondent sought permission to appeal to the Upper Tribunal, which was granted on 23 May 2024. The grant of permission is, in material part, short: "*The grounds are clearly arguable in light of the reasons given for the allowing of the appeal. The grounds need no further elucidation or explanation from me, they speak for themselves*".

13. Notwithstanding this observation, in my judgement the Grounds as drafted do not raise an arguable error of law:

> (i) Sub-paragraphs (a), (b), and (c) of the Grounds are seemingly premised on the notion that the period 16 November 2022 to 16 May 2023 was a period of 6 months, without addressing the First-tier Tribunal's finding that it was in fact a period of 6 months and 1 day.
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> (ii) Sub-paragraphs (d) and (e) criticise the Judge's reliance on **FB and Others** on the basis that the particular Immigration Rules being considered therein had since been amended. However, there is nothing in such a change that alters that part of **FB** that is concerned with evaluating period of time – e.g. see the first sentence of the headnote "*A person given leave to enter the United Kingdom for a period expiring on the day bearing the same date as the date of entry in the sixth month after entry is given leave for a period of six months and one day.*"

14. In this context I am essentially in agreement with the substance of the Appellant's Rule 24 response dated 18 June 2024. The Rule 24 response additionally notes that the First-tier Tribunal Judge supported his reasoning in respect of the calculation of time at paragraph 15 of the Decision in a manner that withstands scrutiny independently of anything said in **FB**. Yet further, whilst the foregoing is relevant to Submission 1, the Grounds do not seemingly raise any challenge in respect of the First-tier Tribunal's acceptance of Submission 2.

15. All else being equal, the foregoing analysis would ordinarily be sufficient to dispose of the Secretary of State's challenge.

16. However, perhaps in recognition of the weakness of the case as pleaded in the Grounds, Mr Terrel's industry has resulted in the Respondent filing a Rule 25 reply dated 29 July 2024.

17. I address the substance of the Rule 25 reply below. First though, it is appropriate to observe that the Rule 25 reply is two days outside the time provided by rule 25(2). More particularly, the Rule 25 reply is not in substance "*a reply to any response provided under rule 24*"; rather, it raises a completely different basis of challenge to the decision of the First-tier Tribunal. To this extent, during the hearing, Mr Terrell sought

permission to amend the Grounds of Appeal in accordance with the text of the Rule 25 reply.

18. In this latter context I note that when the Rule 25 reply initially stood as no more than a Rule 25 reply at the beginning of the hearing, Ms Ferguson indicated that notwithstanding that it was out-of-time she was prepared to engage with its contents. After Mr Terrell, in the course of submissions, indicated that he wished formally to apply to amend the Grounds of Appeal, Ms Ferguson observed that such an application came very 'late in the day', and brought with it inconsistency and uncertainty in respect of the Respondent's position. Necessarily these entirely understandable observations did not alter the fact that Ms Ferguson was prepared to advance submissions in respect of the matters raised in the Rule 25 / amended Grounds.

19. At the hearing I indicated that I would reserve my position in respect of allowing the Grounds to be amended, but would hear arguments in respect of the substance of the contents of the Rule 25 response in any event. This was because it seemed to me that the substance of the Respondent's submissions in this regard were relevant to the issue of whether an amendment should be allowed.

20. The principal point now made by way of the text of the Rule 25 response is straightforward – and in my judgement compelling.

21. It is pleaded that both parties before the First-tier Tribunal, and the First-tier Tribunal Judge, lost sight of the distinction between the period of validity of a grant of entry clearance, and the period of any associated leave to enter. The position is governed by the Immigration (Leave to Enter and remain) Order 2000, and in particular article 4 – 'Extent to which entry clearance is to be leave to enter'. In short, entry clearance granted with validity from 16 November 2022 until 16 May 2023 does not denote, or constitute, leave to enter for the same period; the period of leave to enter does not commence until arrival in the UK. See in particular Article 4(3)(b):

> "*(3) In the case of any form of entry clearance to which this paragraph applies, it shall have effect as leave to enter the United Kingdom on one occasion during its period of validity; and, on arrival in the United Kingdom, the holder shall be treated for the purposes of the Immigration Acts as having been granted, before arrival, leave to enter the United Kingdom:*
>
> > *(a)…*
> >
> > *(b) in the case of an entry clearance which is endorsed with conditions, for a limited period, being the period beginning on*

> *the date on which the holder arrives in the United Kingdom and ending on the date of expiry of the entry clearance.*"

22. It follows that, notwithstanding that the period of validity of the grant of entry clearance commenced on 16 November 2022, the Appellant was not granted leave to enter until he was admitted to the UK on 30 November 2022 – at which point he was granted leave until 16 May 2023. Necessarily this was "*valid leave granted for a period of 6 months or less*", and therefore 'caught' by the 'Immigration status requirement' of E-LTRP.2.1. (b). In turn, this was dispositive of Submission 1 before the First-tier Tribunal.

23. I note that Ms Ferguson invited me to consider that the relevant date was the commencement of the validity of the entry clearance, but I find no support for that submission – and indeed it is contrary to the plain meaning of the words of the 2000 Order, and the wording of E-LTRP.2.1. – "*valid leave*", not 'valid entry clearance'.

24. What remains is 'Submission 2'. In my judgement there is arguable scope for criticism of the First-tier Tribunal's approach to this issue too.

25. Paragraph 17 of the Decision articulated the submission in these terms - and it is to be recalled that the Judge found "*sense in the arguments*" (paragraph 20):

> "*Additionally, given that the appellant applied prior to his leave expiring, he submits that he was under s.3C leave (Immigration Act 1971) and this has extended his leave as a domestic worker beyond six months by the date of the decision. He made a private and family life 10 year route application on 15 May 2023 and then varied that to a Spouse application on 19 June 2023. The respondent accepts that this was a valid in-time application.*"

26. It seems to me that the potential difficulty that this submission encounters is that in order for the spouse application of 19 June 2023 to be treated as a valid in-time application it was necessary to treat it as a variation of the application made on 15 May 2023. As such the true date of application is arguably 15 May 2023 (when the Appellant was present with valid leave granted for a period of 6 months or less), and not 19 June 2023 (when he was present with statutorily extended leave).

27. However, in my judgement no issue in this regard has been pleaded in either the original Grounds of challenge, or in the Rule 25 reply (the purported amended Grounds). I do not accept Mr Terrell's submission that such a challenge is to be found in paragraphs (d) and (e) of the initial

Grounds: paragraph (d) goes no further than identifying that **FB** related to a different version of the Immigration Rules; paragraph (e) is no more than a summarising paragraph – "*It is therefore submitted…*". Nor can I identify any such pleading in the Rule 25 reply, which appears to be confined to the meaning and effect of Article 4 of the 2000 Order; the references to **FB** at paragraphs 8 and 9 appear to be no more than illustrative of the effect of Article 4.

28. Accordingly, whilst I find that there may be arguments undermining the First-tier Tribunal's adoption of the Appellant's Submission 2, the proper place for such arguments would have been before the First-tier Tribunal, and the Respondent did not engage with the Appellant's Skeleton Argument in this regard. Be that as it may, and in any event, no such arguments have formally been pleaded before the Upper Tribunal.

29. In such circumstances, and notwithstanding that I find compelling merit in the submissions articulated by Mr Terrell in the Rule 25 reply, I decline to grant the application to amend the Grounds of challenge. This is in small part because of the lateness of the application, but for the main part because the intended amendment does not go far enough in addressing all of the issues relied upon by the First-tier Tribunal in determining the appeal in the favour of the Appellant.

30. The consequence is such that I find that there is no challenge pleaded before me that establishes an error of law on the part of the First-tier Tribunal. The Respondent's challenge fails accordingly, and the Appellant's appeal remains allowed.

Notice of Decision

31. The Grounds of Appeal disclose no material error of law in the decision of the First-tier Tribunal which accordingly stands.

32. The appeal of Shahidur Rahman remains allowed.

I. Lewis
Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)
19 November 2024