Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23834/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 July 2013	**On 19 July 2013**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SUMAN BHOWMIK

Respondent

Representation:

For the Appellant: Mr J Morris, HOPO
For the Respondent: Mr R Rai, Counsel

DETERMINATION AND REASONS

1. The respondent is a citizen of Bangladesh born on 28 December 1980. On 16 November 2011 he applied for leave to remain in the UK as a dependant of his wife Nibedita Nath. She was then a Tier 1 (Post-Study Work) Migrant also studying for her ACCA examinations. This application was refused on 17 October 2012 for the reason that he was last granted

leave outside the Immigration Rules and the Secretary of State was not satisfied that the respondent had last been given leave to enter or remain in the UK as the partner of a relevant points-based system migrant. The respondent therefore did not satisfy the requirements of the Immigration Rules and his application was refused under paragraph 391C(h) of HC 395. The respondent was also told that he may wish to rely on a family or private life in that the Rules were amended on 9 July 2012 and now include provisions for such an application. If he wished the UKBA to consider an application on this basis, he must make a separate charged application using the appropriate application form.

2. The respondent lodged a notice of appeal on 24 October 2012 against the Secretary of State's decision. His grounds were that the decision was not in accordance with the Immigration Rules and otherwise not in accordance with the law. The decision violated his private life protected under Article 8 of the ECHR.

3. The respondent's appeal was allowed by First-tier Tribunal Judge St J Wiseman in a determination promulgated on 8 March 2013.

4. The First-tier Tribunal Judge found that there were some confusing aspects of this case, particularly in relation to the last period of leave granted to the respondent and the fact that it appears to have taken almost a year to respond to the current application. The respondent thought that he had obtained his previous leave as a dependant of his wife, whereas the Secretary of State said he was only granted leave outside the Rules. The judge said he suspected that the latter was the case because his visa made no reference to the category of dependant, but it was far from clear on what basis his visa was actually granted. He presumed that it had something to do with the fact that between the respondent and his wife they had a baby who needed looking after while the wife continued to work and study there. There being no apparent basis for him being granted such a visa, one has to presume that the Secretary of State was already recognising in effect that there were significant Article 8 issues in play, particularly in relation to the wellbeing of the young baby. If this was the case then it of course made the approach they adopted towards the present application somewhat illogical.

5. The judge found that even though there may have been a misunderstanding, he did not believe that the respondent in fact had a dependant visa at the present time and therefore his application under the Immigration Rules must fail.

6. The judge could not see that the respondent can be required to make an Article 8 application under the new Rules by way of a separate application, as the respondent had raised Article 8 issues in the notice of appeal, and he was required to make a decision in that respect. In any event, he said that it may well be that the respondent could not meet any requirements in the new Rules, but it was equally clear that he was obliged to go on and

consider a freestanding Article 8 application in any event, bearing in mind recent authorities in this connection.

7. Having considered all the evidence before him, the judge allowed the respondent's appeal under Article 8. His findings were as follows:

> "30. There are no problems in this country in relation to maintenance and accommodation and of course the appellant might have succeeded at some date in the future if he had left the United Kingdom and made a further application as a dependant out of country. However it is wholly a matter of conjecture as to when such an application would be dealt with and when any visa would be granted and the young child of the family requires, on any consideration of section 55 alone, the immediate presence of the appellant; not only to relieve his wife, but to enable him to have the appropriate bonding relationship with his child. They would spend a minimum of months away from each other if not longer if the appellant had to return to Bangladesh to make a fresh application and there is no reason whatsoever why the child or indeed the appellant should have to suffer in that way. Procedural issues only arise in this case as the respondent can have no fundamental objection to the appellant being here as a dependant, and cannot for example even begin to argue that he should be removed and not permitted to return.
>
> 31. The visa of the wife lasts until 20th September 2014 and that is the only period of time that I am concerned about. What this couple may be entitled to beyond that time is an entirely separate matter that is not for me.
>
> 32. All I am deciding is that the removal of the appellant from the United Kingdom without his wife and child is wholly disproportionate, and that is it equally disproportionate to expect the wife and child to return home at the present juncture when there are relevant visas in place for them to be here; he should be granted a visa allowing him to remain here until the time his wife's visa expires when they will have to take whatever steps they are so advised at that time.
>
> 33. The appellant is a man of good character as far as I am aware and causing no problem or difficulty in this country. The respondent had been perfectly content to have him in this country for nearly six years and cannot in my view possibly sensibly argue that there is objection to that now in the broad circumstances I have heard about.
>
> 34. I have purposely not tried to go too deeply into historical matters about which the evidence could be said to be a little hazy, and in real terms to concentrate upon the practical result that is

> required to ensure that the best interests of the child are given full consideration. There can only be one answer as far as that is concerned, namely that he should be brought up by his two parents on a day by day basis, in this country at least until 15th September 2014."

8. The grounds of appeal that were lodged on behalf of the Secretary of State argued that the judge erred in his approach in paragraph 29 when he stated that the respondent should not have had his case considered under the Article 8 provisions of the Immigration Rules. It was further submitted that the Tribunal was obliged to consider any Article 8 application made after 12 July 2012 under the new Immigration Rules. In this case the decision challenged was dated 12 October 2012 and Article 8 appears to have been raised as part of the ongoing appeal. The Tribunal should therefore have considered Article 8 under the Immigration Rules. In the alternative, it was submitted that the Tribunal failed to apply the correct test in this case. In a case where entry clearance is an option to consider, the decision maker should apply **Hayat**. The Tribunal has had absolutely no regard to that test here, and in so doing it has materially misdirected itself.

9. In granting permission First-tier Tribunal Judge Osborne said she was satisfied that the judge should have given consideration to the respondent's rights under Article 8 as set out in Appendix FM of the Immigration Rules even though he was not precluded from further considering his Article 8 rights under Section 6 of the Human Rights Act as well. This was confirmed by the Upper Tribunal in the case of **MF (Article 8 – new Rules) Nigeria [2012] UKUT 00393 (IAC)**. The failure of the judge to adopt the proper approach was arguably a material error of law.

10. Counsel submitted a skeleton argument on behalf of the respondent.

Findings

11. I found that the judge indeed failed to consider the respondent's rights under Article 8 as set out in Appendix FM of the Immigration Rules. I find, however, that the error was not material in that the appellant could not have met any of the requirements in the new Rules as acknowledged by the judge at paragraph 29.

12. I find that the judge did not err in law in his consideration of the respondent's appeal under Article 8 of the ECHR, which he rightly said he was required to do, bearing in mind recent authorities in this connection.

13. At paragraph 2.8 of Counsel's skeleton argument was an extract of **Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC)** where it was held "the significance of **Chikwamba v SSHD [2008] UKHL 40** is to make it plain that, in appeals where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the

Immigration Rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance. The **Chikwamba** principle is not confined to cases where children are involved or where the person with whom the appellant is seeking to remain has settled status in the United Kingdom.

14. I find that although the judge did not specifically mention **Hayat**, it is plain from the findings in paragraph 30 to 34, that the judge applied the test in **Hayat**.

15. I find that the judge's decision does not disclose a material error of law.

16. The judge's decision allowing the respondent's appeal under Article 8 of the ECHR shall stand.

Signed Date

Upper Tribunal Judge Eshun