



IAC-AH-KEW-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/02512/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18<sup>th</sup> November 2015**

**Decision & Reasons Promulgated  
On 21<sup>st</sup> December 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY**

**Between**

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

Appellant

**and**

**MRS N R  
(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Staunton, Home Office Presenting Officer

For the Respondent: No representation

**DECISION AND REASONS**

1. The Appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The Appellant is a citizen of Bangladesh born on 1<sup>st</sup> January 1991. She appealed against the decision of the Respondent dated 30<sup>th</sup> December 2014 refusing to grant her leave to remain in the United Kingdom as the partner of IAK. Her appeal was heard by Judge of the First-tier Tribunal Sullivan. He dismissed the appeal under the Immigration Rules but

allowed it on human rights grounds (Article 8) in a determination promulgated on 25<sup>th</sup> June 2015.

3. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Mark Davies on 1<sup>st</sup> October 2015. The permission states that it is arguable that unfairness has been caused to the Respondent by the judge's decision to decide the appeal on the papers, as the Respondent was never put on notice that that was going to happen so she had no opportunity to object to that course of action and had no opportunity to decide whether she could agree to it going ahead without a hearing.
4. There were other grounds which are not referred to in the permission. In the Respondent's decision it is stated that the Appellant has failed to meet the requirements of paragraph 319C(i) because her partner is not a government-sponsored student and is not undertaking a course of study with a Sponsor who is either a recognised body or a higher education institution. His previous leave was not as a Tier 4 (General) Student or a student and the Appellant's previous leave was not as the partner of a Tier 4 (General) Student or as a student undertaking a course of study longer than six months. The grounds state that the matter was not considered by the First-tier Judge in terms of Appendix FM and neither did he use his residual discretion outside the Rules. The grounds state that the First-tier Judge should have considered the Appellant's family life under Appendix FM of the Immigration Rules but instead, moved straight to a freestanding assessment under Article 8 of ECHR. The grounds state that by failing to consider the position of the Appellant through the prism of the Immigration Rules the judge failed to import the appropriate weight as he did not take into account the public interest considerations in which the Respondent has a legitimate role. The grounds go on to state that the judge also misdirected himself as to the ambit of Section 117B of the Nationality, Immigration and Asylum Act 2002 which deals with public interest. The judge states in the decision that there is no evidence of the Appellant's English language ability and the grounds state that this is a material consideration which has to be taken into account when proportionality is assessed.
5. The Appellant did not appear for the hearing of this appeal. Neither did her representative. Her representative was telephoned and he asked for the claim to be decided without the Appellant or her representative being present.

### **The Hearing**

6. The Presenting Officer submitted that the judge should not have dealt with the appeal on the papers without giving notice to the Respondent that that was being done as this caused unfairness to the Respondent as she had no opportunity to object to that course of action and had no opportunity to decide whether she could agree to the appeal being decided without a hearing.

7. I considered the papers on file. There is a letter dated 11<sup>th</sup> November 2015 by the Appellant's representatives asking for the hearing to proceed on the papers, based on the documents submitted to the Tribunal. A reply was sent to the representatives on 16<sup>th</sup> November 2015 refusing this adjournment request and stating that the appeal was to remain listed for an oral hearing on 18<sup>th</sup> November 2014. The Home Office did not provide a representative for the hearing so no submissions were made on behalf of the Respondent. Had a Presenting Officer attended the hearing he would have been able to put forward his submissions. In these circumstances there was no unfairness to the Respondent.
8. I explained to the Presenting Officer that I found there to be no error on this issue.
9. The Presenting Officer then dealt with Article 8 submitting that the judge made himself the primary decision maker by not considering the appeal under the Immigration Rules but instead going ahead and dealing with the matter on a freestanding Article 8 basis. I was referred to the case of **SS Congo [2015] EWCA Civ 387**. He submitted that Part 5A, Section 117B of the Nationality, Immigration & Asylum Act 2002 was not considered by the judge and the fact that the Appellant has no language test certificate was not considered by the judge.
10. He submitted that these are errors of law and when taken together constitute a material error of law.
11. It is clear from the determination that the judge accepts that the terms of paragraph 319C (i) of the Rules cannot be satisfied. Once the judge decided this he failed to consider Article 8 within the Immigration Rules. Had the Appellant considered Article 8 within the Immigration Rules he would have found that the terms of the Rules could not be satisfied. Not only did the judge not consider the Appellant's family life with reference to Appendix FM of the Immigration Rules, he also failed to consider this issue when assessing proportionality. The only mention of public interest is at paragraph 23 of the determination and it is not considered fully. When proportionality is assessed, failure to meet the terms of the Rules is an important issue, as is the Appellant's lack of an English language certificate which is referred to by the judge in paragraph 23 of his decision.
12. In the said case of **SS Congo** it is stated that there has to be a fair balance between an individual's protected interests and the general public interest so public interest considerations have to be properly assessed. This is a case where public interest is important and at paragraph 33 of **SS Congo** it is stated that the general position is that compelling circumstances need to be identified to support a claim for a grant of leave to remain outside the Rules and Appendix FM. It goes on to say that very compelling reasons are required before a claim outside the Rules and Appendix FM can succeed.

13. At paragraph 25 of the determination the judge refers to the Appellant's right to family and private life and public interest but the proportionality assessment has not been properly dealt with.
14. By the judge making himself the primary decision maker and by him failing to consider Appendix FM there is a clear material error of law in the judge's decision.
15. When I take into account what was before the judge when he made his decision, there was not sufficient evidence for the appeal under Article 8, in terms of the Rules, to be satisfied and there was no good arguable case for considering the claim outside the Rules.
16. As there are no very compelling reasons for allowing this appeal outside the Rules and because there is a material error of law in the judge's decision I am dismissing this appeal without the necessity of a further hearing.

### **Notice of Decision**

I find there to be a material error of law in the First-tier Tribunal's decision. The First-tier Judge's decision must therefore be set aside.

I dismiss this Appellant's appeal under the Immigration Rules and on human rights issues.

Anonymity has been directed.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge I A M Murray