Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08111/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th October 2019	**On 21st October 2019**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

H M MURSHED NUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Biggs, Counsel instructed by Universal Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Bangladesh. He arrived in the UK as a student in January 2008 with leave valid until 3rd March 2011. He secured further leave to remain as a student until 24th February 2015. However, on 25 April 2014 his leave to remain was curtailed. He remained in the UK unlawfully. On 2nd September 2014, he made an application for leave to remain on private life grounds, but that application was refused on 3rd July

2015. Most recently, on 11th March 2019, the appellant made an application for leave to remain under Appendix FM of the immigration rule on the basis of his family life with his partner Syeda Sayma Begum. That application was refused by the respondent for the reasons set out in a decision dated 18th April 2019.

2. In her decision, the respondent accepts that the application for leave to remain does not fall for refusal on grounds of suitability. The respondent accepted that the eligibility relationship requirement, eligibility financial requirement and eligibility English language requirement is met by the appellant. The respondent concluded that the appellant could not meet all of the eligibility requirements of section E-LTRP of Appendix FM, because the appellant cannot satisfy the eligibility immigration status requirement. The respondent concluded that the appellant is in a genuine and subsisting relationship with his British partner, but there was no evidence that there are insurmountable obstacles to the appellant and his partner continuing their family life together outside the UK in Bangladesh.

3. The decision of 18th April 2019 gave rise to an appeal that was heard by F*t*T Judge Geraint Jones QC on 14th June 2019. The appeal was dismissed for the reasons set out in a decision promulgated on 25th June 2019. It is that decision that is the subject of the appeal before me. Permission to appeal was granted by First-tier Tribunal Judge Robertson on 20th August 2019.

<u>The decision of First-tier Tribunal Judge Geraint Jones QC</u>

4. At the hearing of the appeal, it was accepted by the appellant that he is unable to meet the requirements in Section R-LTRP of Appendix FM for limited leave to remain as a partner. The applicant accepted that he is unable to meet all the requirements of Section E-LTRP. That is, the eligibility for leave to remain as a partner, because on any view, the immigration status requirement could not be met by the appellant. It was accepted by the appellant that in the circumstances, to succeed in an

application under the immigration rules the appellant would have to rely upon Section EX.1.(b) and establish that he has a genuine and subsisting relationship with a partner, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

5. There was an application made by counsel for the appellant for an adjournment. That application was made on the basis that the appellant's wife suffers from ill-health and in determining whether there are insurmountable obstacles to the family life between the appellant and his wife continuing outside the UK, it would assist the Tribunal to have medical evidence relating to the health of the appellant's wife. The judge referred to the limited evidence regarding the health of the appellant's wife that was in the appellant's bundle, and in the absence of any clarity as to the medical evidence to be sought, refused the application for an adjournment for the reasons set out at paragraphs [6] to [10] of the decision.

6. The appellant and his wife gave evidence. The judge sets out the evidence received by the Tribunal at paragraphs [12] to [22] of the decision. The judge's findings of fact are set out at paragraph [23] of his decision. The judge acknowledged, at [25], that relocation to Bangladesh for the appellant's wife would necessarily involve a degree of hardship, involving her giving up her present job and living remote from her family members, but was far from persuaded that any such hardship reaches the comparatively high threshold required to establish very significant difficulties which could not be overcome or would entail very serious hardship for the applicant or his partner. At paragraph [26], the judge stated that he has not ignored any medical issues, but it was not claimed that any medical treatment required by the appellant's wife would not be available and/or accessible to her in Bangladesh.

7. At paragraph [27] of the decision, the judge concluded as follows:

> "It was also submitted that this is a Chikwamba situation. In other words it was said that if the appellant has to return to Bangladesh to apply for settlement from outside the United Kingdom, that would be a mere formality and unnecessary inconvenience because any such application would be bound to succeed. Although there is a certificate dated 28 September 2018 at page 22 in the bundle, showing that it emanates from Trinity College London, there is no evidence whatsoever to demonstrate that the Entry 1 Speaking and Listening examination that the appellant passed, comes within the requirement in E-ECP4.1(b) of Appendix FM. It also cannot be assumed that the appellant will be found to satisfy the suitability requirements, given that he has flouted and abused the immigration laws of this country (S-EC.1.5). It is not for me to decide whether he would or would not satisfy any of those requirements; it is only if I am satisfied that he is almost bound to do so, that the Chikwamba line of reasoning applies.".

The appeal before me

8. Mr Biggs submits the judge erred at paragraph [27] of his decision in proceeding upon the basis that the evidence from Trinity College London, does not demonstrate that the Entry 1 Speaking and Listening examination that the appellant passed, comes within the requirement in E-ECP4.1(b) of Appendix FM. Furthermore the judge erred in proceeding upon the premise it cannot be assumed that the appellant would be bound to satisfy the suitability requirement. In the respondent's decision of 18th April 2019, the respondent accepts that the application for leave to remain does not fall for refusal on grounds of suitability and accepted the eligibility English language requirement is met by the appellant. He submits that following the decision of the Court of Appeal in Hayat -v- SSHD [2012] EWCA Civ 1054 there is no sensible reason for requiring the appellant to return to Bangladesh to make an application for entry clearance, notwithstanding his immigration history.

9. The appellant claims the judge also erred in refusing the application for an adjournment. It is said that the submission made on behalf of the appellant was that the appellant's wife has undiagnosed medical/health ailments that are under investigation. The appellant's wife had already had blood tests and had been informed that further investigation was necessary, but it never occurred to her that her undiagnosed illness was relevant until the conference on the morning of the appeal hearing. The

appellant claims the judge failed to determine whether there was a good reason for requesting an adjournment, and whether the appeal could be justly determined, without an adjournment.

10. Mr Walker, rightly in my judgement, accepts that the Judge erred in his approach to the determination of the Article 8 claim and in particular, the application of the effect of C (Zimbabwe) v SSHD [2008] 1 W.L.R. 1420 together with subsequent Court of Appeal cases in which that case had been considered. He accepts that the respondent accepted in the decision of 18th April 2019 that the application for leave to remain does not fall for refusal on grounds of suitability. The judge erred in proceeding upon the basis that it could not be assumed that the appellant will be found to satisfy the suitability requirements. The respondent also accepted that the eligibility relationship requirement, eligibility financial requirement and eligibility English language requirements were met by the appellant. The respondent had concluded that the appellant could not meet all of the eligibility requirements of section E-LTRP of Appendix FM, because the appellant cannot satisfy the eligibility immigration status requirement.

11. In light of that concession, it is clear that the decision of the F*t*T Judge is infected by a material error of law and the decision must be set aside. Mr Biggs submits the remaining ground of appeal regarding the refusal of the application for an adjournment is relevant to disposal because the appellant was essentially denied a fair hearing and should have had the opportunity to adduce medical evidence. The F*t*T judge considered the application for an adjournment to be speculative and he submits, that was not a rational characterisation of the application. There was uncertainty about the health of the appellant's wife and there was ongoing investigation. The disclosure of medical records on their own would not have assisted the Tribunal because they would not shed light on an undiagnosed condition. He submits the appropriate course is to remit the matter for hearing afresh before the F*t*T, because it may be necessary for further findings to be made and for the Tribunal to consider whether there

is a sensible reason for the appellant to make an application for entry clearance in light of the health of the appellant's wife.

12. Mr Walker accepts that there was some medical evidence before the F*t*T judge that the appellant's wife had ongoing medical problems and in light of the particular facts of this case, he would not seek to persuade me that there is a sensible reason for requiring an application for entry clearance to be made by the appellant.

13. In light of the sensible concessions made by Mr Walker, I do not need to address the remaining ground of appeal and there is no reason why I should not remake the decision in the Upper Tribunal.

Remaking the decision

14. The only ground of appeal available to the appellant is that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. As to the Article 8 claim, the burden of proof is upon the appellant to show, on the balance of probabilities, that he has established a family life with his partner, and that his removal from the UK as a result of the respondent's decision, would interfere with that right. It is then for the respondent to justify any interference caused. The respondent's decision must be in accordance with the law and must be a proportionate response in all the circumstances. If Article 8 is engaged, the Tribunal may need to look at the extent to which an appellant is said to have failed to meet the requirements of the rules, because that may inform the proportionality balancing exercise that must follow.

15. As I have already set out, in her decision, the respondent accepts that the application for leave to remain does not fall for refusal on grounds of suitability. The respondent accepted that the eligibility relationship requirement, eligibility financial requirement and eligibility English language requirement is met by the appellant. It is however uncontroversial that the appellant is unable to satisfy all the requirements

for leave to remain as a partner as set out in Appendix FM of the immigration rules.

16. The judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 confirms that the fact that the immigration rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules.

17. As to the human rights claim on Article 8 grounds, I adopt the approach set out by Lord Bingham in Razgar [2014] UKHL 27. I must first determine whether Article 8 of the ECHR is engaged at all. If Article 8 is engaged, I should go on to consider the remaining four stages identified in Razgar.

18. The respondent accepted that the eligibility relationship requirement is met by the appellant and I find that the appellant is in a genuine and subsisting relationship with his wife. Article 8 is plainly engaged. I also find that the decision to refuse the appellant leave to remain may have consequences of such gravity as potentially to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved. The appellant's ability to satisfy the immigration rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. I find that the appellant cannot satisfy the requirements for leave to remain as the partner set out in Appendix FM of the immigration rules.

19. I remind myself that section 117A Nationality, Immigration and Asylum Act 2002 requires that in considering the public interest question, I must (in

particular) have regard to the considerations listed in section 117B. I acknowledge that the maintenance of effective immigration controls is in the public interest. I also acknowledge in particular that little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully. Factors such as the appellant's ability to speak English and financial independence, do not weigh in favour of the appellant, but are neutral.

20. In considering whether the refusal of leave to remain is disproportionate, I note that the only requirement for leave to remain as a partner set out in Section R-LTRP of Appendix FM that cannot be met by the appellant is the immigration status requirement. In Hayat -v- SSHD, the Court of Appeal held that the effect of Chikwamba is that (a) where an applicant lacked lawful entry clearance, the dismissal of his Article 8 claim on the procedural ground that he should, as a matter of policy, have made the application from his own state, might constitute a disruption of family or private life sufficient to engage Article 8; (b) where Article 8 was engaged, it was a disproportionate interference with family or private life to enforce such a policy unless there was a sensible reason for doing so; (c) whether it was sensible to enforce that policy was fact-sensitive; (d) where Article 8 was engaged and there was no sensible reason for enforcing the policy, the decision-maker should determine the Article 8 claim on its substantive merits, notwithstanding that the applicant had no lawful entry clearance; (e) it would be a very rare case where it was appropriate for the Court of Appeal, having concluded that a lower tribunal had disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself; (f) nothing in Chikwamba was intended to alter the way the courts should approach substantive Article 8 issues; (g) if the secretary of state had no sensible reason for requiring the application to be made from the home state, her failure to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise.

21. More recently in Agyarko -v- SSHD [2017] UKSC 11 Lord Reed said:

> "50. ... As the instruction makes clear, "precariousness" is not a preliminary hurdle to be overcome. Rather, the fact that family life has been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affects the weight to be attached to it in the balancing exercise.
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> 51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."

22. I have carefully considered the limited medical evidence before the Tribunal regarding the health of the appellant's wife. There is now evidence that she requires close monitoring and abnormalities were found in her blood, relating to abnormal liver function, and raised platelet counts, for which she is currently under investigation. The abnormalities put her at a higher risk of stroke or a heart attack. Since the hearing before the F*t*T and the decision of the F*t*T, the appellant's wife has also been found to have had an ectopic pregnancy that is life-threatening. There is evidence that the appellant's wife is suffering physically and emotionally, and needs the support from her husband whilst further investigations are being carried out. Mr Walker accepts that on the particular facts here, the appellant is able to establish that the requirements for entry clearance as a partner are met by the appellant, and in light of the evidence regarding the health of his wife, there is no sensible reason for requiring an application for Entry Clearance to be made by the appellant from Bangladesh.

23. In my judgement on the particular facts of this case, notwithstanding the appellant's immigration history, and even acknowledging that little weight should be given to a relationship that was established by the appellant at a time when he was is in the United Kingdom unlawfully, the public

interest does not require the removal of the appellant because any application for entry clearance made by the appellant, would succeed. The disruption caused to the Article 8 rights of the appellant and his wife in particular, would in the circumstances, be entirely disproportionate to the legitimate aim of immigration control. The decision of the House of Lords in Chikwamba v SSHD and subsequent decisions of the Court of Appeal and Supreme Court that I have had regard to, establish that where there is evidence that an application for entry clearance from abroad is likely to succeed, then the weight to be accorded to the requirements of obtaining entry clearance from abroad is reduced.

24. In my judgment having taken all the evidence into account, the refusal of leave to remain is disproportionate to the legitimate aim of enforcing immigration control. It follows that the appeal is allowed.

Notice of Decision

25. The appeal against the decision of F*t*T Judge Geraint Jones QC is allowed, and the decision of F*t*T Judge Geraint Jones QC is set aside.

26. I remake the decision and allow the appeal on Article 8 grounds.

Signed Date 18th October 2019

Upper Tribunal Judge Mandalia

FEE AWARD

I have allowed the appeal, but only after a careful consideration of the medical evidence relation to the health of the appellant's wife that was not before the SSHD and I therefore decline to make a fee award

Signed Date 18th October 2019

Upper Tribunal Judge Mandalia