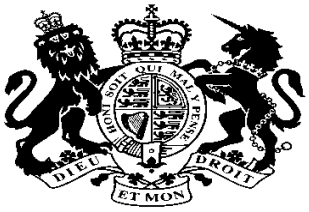

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers:
UI-2023-001108

HU/53045/2022

THE IMMIGRATION ACTS

Heard at Field House **Decision and Reasons Promulgated**
On 6 June 2023 **On 14 July 2023**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MST NUSRAT JAHAN TAMANNA
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellant: Mr A.H Badar of Counsel
For the respondent: Mr A Lindsay, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 20 November 1990. She appealed to the First-tier Tribunal against the decision of the respondent dated 19 October 2021 to refuse to grant her leave to remain in the United Kingdom as a spouse of a British citizen.

2. First Tier Tribunal Judge Shakespeare dismissed the appellant's appeal in a decision dated 27 February 2023 and found that the appellant, does not satisfy the immigration status eligibility requirement of the immigration Rules. Therefore she can return to Bangladesh with her British husband, to make an entry clearance application to return to the United Kingdom or in the alternative both can relocate to Bangladesh and enjoy family life in that country.

3. Permission to appeal was granted by First-tier Tribunal Judge Mr JC Hamilton on 25 March 2023 stating that it is arguable that the First-tier Tribunal Judge did not give adequate reasons for reaching the conclusion that the appellant could return to Bangladesh to apply for entry clearance to join her husband in the United Kingdom in the normal way. The First-tier Judge appears to have taken the view that, notwithstanding the fact that the appellant had no family in Bangladesh and would be alone that these difficulties only apply to single and unmarried women. As the appellant was married, albeit her husband was in the United Kingdom, these difficulties would not apply to her.

First-tier Tribunal's findings

4. The Judge made the following findings in his decision which in summary are the following.

5. The appellant married Mr Ahmed on 9 October 2021 and it is accepted that they are in a genuine and subsisting relationship. The Judge was satisfied that the respondent's decision is an interference with the appellant's right to respect for her family and private life with consequences of such gravity as to potentially engage the protection of Article 8.

6. The appellant met all the requirements of the partner provisions of Appendix FM except the immigration status eligibility requirement because her leave to remain was granted for a period of less than six months.

7. It was accepted by the appellant at the hearing before the First-Tier Tribunal Judge that she does not meet the immigration status requirement in paragraph E – LTRP. 2. 1 of Appendix FM because the appellant has been in the United Kingdom with the valid leave for less than six months.

8. Paragraph EX1 only exempts an applicant from the financial and English language eligibility requirements and it does not act as an exemption to paragraph E– LTRP. 2. 1 which is the relevant paragraph in the appellant's case. In the alternative, even considering paragraph EX1 there are no insurmountable obstacles to family life continuing outside the United Kingdom.

9. The appellant is a citizen of Bangladesh and has spent 30 years of her life in Bangladesh. She is only been in the United Kingdom for two years. She is educated to postgraduate level, having completed a Masters degree in political science. The appellant, in her oral evidence said that before she came to the United Kingdom that she intended to use her qualifications to pursue a career in teaching in Bangladesh.

10. The respondent relied on the case of **Younas (section 117 B (6) (b) [2020] UKUT 00129 (IAC) and Alam Lissa v Secretary of State [2023) EWCA Civ 30** and argued that the appellant's removal is proportionate and therefore not a breach of Article 8. The respondent noted in the refusal letter that the appellant argued that the appellant would very likely succeeded an application for entry clearance from Bangladesh because the respondent accepts that she meets all the relevant eligibility requirements except the immigration status requirement. The appellant further stated that she would have to go to Bangladesh alone as her husband would remain working in the United Kingdom to satisfy the financial requirements. It was also argued on behalf of the appellant that she looks after her mother-in-law, whose interests must also be respected and who suffering from diabetes, almost blind and that heart problems. Given her cultural and religious background the idea of assistance from the NHS or private carers impractical and she will not accept care from strangers.

11. It is accepted that the appellant's brother is missing in Bangladesh following the floods in 2022 and the rest of the family are in the United Kingdom. The appellant could use her experience and language ability to find employment in Bangladesh and support herself and her husband.

12. The appellant's husband stated that it would be difficult for him to find a job in Bangladesh as his skills are not transferable. Even if the husband could not find a job equivalent to that available in the United Kingdom, that does not mean that he could not work at all in Bangladesh.

13. The appellant's husband had suffered from leukaemia in January 2019 there is no further medical evidence of continuing appointments or treatments and the sponsor in a statement describes himself as a cancer survivor who is in remission.

14. The test in paragraph EX. 2 is a very high one. The appellant must show that she or her partner would face very significant difficulties which could not be overcome or would entail very serious hardship and found that the appellant has not discharged this burden of proof.

The appellant and her husband can return to Bangladesh and the appellant can work and support her husband until he settles down.

15. The appellant does not meet the requirements of paragraph 276 ADE because she would not face very significant obstacles to reintegration into Bangladesh.

16. In respect of proportionality, and in the balancing exercise, consideration has been given to the appellant's particular set of circumstances to decide whether the interference with the appellant's private life is proportionate. In that balancing exercise, the Judge considered section 117 A (2) of the Nationality, Immigration and Asylum act 2002 to have regard to the various public interest considerations and that maintenance of effective immigration controls is in the public interest.

17. The appellant's relationship commenced which she came to the United Kingdom of April 2021 on a student visa and they entered into an Islamic marriage in 18 July 2021 which was registered on 9 October 2021. Although her visa expired on 21 August 2021, she applied and was granted "exceptional assurance" to remain in the United Kingdom until 20 October 2021. This grant acted as a short-term protection against adverse action consequences after her visa expired but it did not constitute a further leave such that she could meet the immigration status eligibility requirements.

18. The appellant and her sponsor fully acknowledged that they were both aware that the appellant was only in the United Kingdom for a limited period of time which weighs against her in the balancing exercise.

19. The appellant claims that her mother-in-law is dependent on her for her medical needs. There is nothing to confirm in the documentary evidence provided, the diagnosis of diabetes or cardiac problems of the appellant's mother-in-law. There is also no medical evidence that she suffers from her depression. It is not accepted that the mother-in-law requires such extensive care that she is dependent on her daughter-in-law. Even if she does require care, her mother-in-law is entitled to NHS care in the same way as any other British citizen, including the fact that her son lives with her and her daughter also lives in Ipswich who can assist in supporting her mother-in-law.

20. In **Younus**, the Upper Tribunal confirmed that applicants in an Article 8 appeal will argue that there is no public interest in the removal because they would be granted entry clearance after leaving the UK. However it is essential to address the considerations in section 117B, and reliance on **Chikwamba** does not obviate the need to do this. The Upper Tribunal also confirmed that there cannot be a public interest in removing a person from the United Kingdom when they

would succeed in an entry clearance application but a fact specific analysis is required. This approach has recently been confirmed by the Court of Appeal in **Alam** which confirms that **Chikwamba** did not establish a general rule of law and a full Article 8 analysis is required even where the applicant had been refused on a narrow procedural ground that an applicant had to leave and apply for entry clearance.

21. If the appellant is returned Bangladesh, she would seek to return to the United Kingdom and would make an application for entry clearance. An application for entry clearance from outside the country does not include an immigration status requirement. The respondent accepts that the appellant meets the relationship, financial and English language requirements and it is almost certain that she would qualify for entrance clearance as a partner.

22. Therefore there would only be a temporary separation while the appellant makes an entry clearance application from Bangladesh . The appellant has lived in Bangladesh until the age of 30, speaks Bengali and would be able to participate in day-to-day life in Bangladesh.

23. The CPIN, of June 2020, states that women in Bangladesh fear gender-based violence and that the appellant would face difficulties in Bangladesh “if she were to return alone”. However the paragraphs quoted refer to stress that marriage is the main form of social acceptance and focus on the difficulties faced by some unmarried or divorced women. The appellant would not fall into that category. The appellant would return as a married woman and these difficulties would not apply to her.

Grounds of appeal

24. The main case that the Tribunal relied on is **Alam** which can be distinguished in appellant’s case. In **Alam** the deciding factor was against the backdrop of unlawful and overstaying immigrants. In this appeal the Judge accepts that the appellant made an application whilst having valid leave as she was granted exceptional assurance leave and allowed to remain in the United Kingdom for two further months beyond her six month visa. The appellant does not have a horrendous immigration history nor is there any finding that she had intended to come to the United Kingdom to marry. The respondent has accepted that she is a qualified partner, in a genuine and subsisting marriage, with a British citizen.

25. The Judge in the decision quoted the remarks in **Alam** and stated “a preliminary assessment of the merits of an Article 8 claim may be relevant to whether a policy of requiring an application for entry clearance should be enforced often the merits would not be clear without careful assessment of the facts, which would therefore be

relevant to whether the policy should be enforced not. A dogmatic adherence to such a policy in other cases might also be a disproportionate interference with Article 8.

26. The Judge accepts that the appellant does not have family in Bangladesh and her husband is a cancer survivor and suffers from some anxiety and would cause difficulties and considerable upheaval in relocation for him. The Judge also accepts that his mother-in-law need some degree of support that the appellant assists her , including emotional support. The appellant is financially self-sufficient and the income threshold can be met and that she can speak English. The Judge also acknowledged that appellant meets the relationship, financial English language requirements and stated that she would almost certainly qualify for entry clearance. The appellant does not have an immigration history which includes foreign criminals, appalling immigration history and unlawful or overstaying her leave.

27. The Judge finds that the objective evidence in COIS of 2020 does not help because the appellant is not divorced or unmarried. However the Judge dismisses this issue unfairly without full analysis of the situation as the appellant would return on her own separate from her husband. There is no house or family in Bangladesh for her to go to. The appellant would be a lone woman in Bangladesh.

28. The Judge therefore misapplied the principal in **Chikwamba** as there is a flexibility when it comes to section 117B (1). This flexibility should be applied through the prism of the **Chikwamba** principle, then appeals as the instant one fall to be allowed should there be no criminality or other seriously aggravating features. Furthermore, the maintenance of effective immigration control is not undermined.

29. The second ground of appeal is that the First-tier Tribunal Judge erred in the Article 8 balancing exercise. The Judge stated that the only factor against the appellant in respect of the immigration rules was that the appellant could not meet the threshold of six months visa. This is a failure as the appellant’s proximity to meeting the immigration rules was a matter to be taken into consideration. The appellant fulfilled all the requirements of the immigration rules except one. The respondent gave the appellant exceptional assurance leave for two months which means that she had eight months leave was not unlawfully in the country.

30. The third ground of appeal is that the assessment of public interest in the Article 8 assessment. In **Agyarko v SSHD [2017] UKSC 11**, Lord Reed stated that whether the applicant is in the United Kingdom unlawfully, or is entitled to remain in the United Kingdom only temporarily, however, the significance of this consideration depends on what the outcome of the immigration control might otherwise be. For example, if an applicant would otherwise be automatically

deported as a foreign criminal, then the public interest in the removal would be very considerable. If on the other hand, an applicant – even if residing in the United Kingdom unlawfully – was otherwise certain to be granted leave to enter or at least if an application was made from outside the United Kingdom, then there might be no public interest in his or her removal.

31. In the case of **Kaur (of the application of) versus Secretary of State for the Home Department [2018] E WCA CIV 1423** Holly Rd LJ noted at paragraph 45 that it is relevant to note that when an applicant who was "certain to be granted leave to enter" if an application were made from outside the United Kingdom, there might be no public interest in removing the applicant. This shows that there has to be a fact specific assessment in each case an "will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain.

32. The maintenance of immigration control as one factor is premised on people who have an appalling immigration history and deporting criminality elements. The appellant meets speaks English, is financially independent, applied when she had valid leave, and was not an over stayer unlawfully in the United Kingdom. She formed a genuinely loving relationship and has known the sponsor since 2011, and will almost certainly qualify to return to the United Kingdom because she meets the requirements of the immigration rules as found by the First-tier Tribunal Judge.

The hearing

33. I heard submissions from both parties at the hearing. The Senior Presenting Officer submitted as a preliminary point that the respondent has been ambushed as a new ground of appeal has been raised at the hearing which has not been raised in the grounds of appeal. This is the consequences of exceptional assurance leave which was granted to the appellant under the respondent's coronavirus pandemic policy and whether this amounts to further valid leave for the purposes of the immigration rules. This has not been raised in the grounds of appeal and there is no Rule 24 response on this issue. This leave was only meant as a short-term protection for applicants from any adverse consequences of unlawful stay and does not grant valid leave to the appellant such as that her leave has been extended by a further two months.

34. The appellant's counsel agreed that this was not raised in grounds of appeal but wished to argue it. He said the appellant was granted exceptional assurance leave by the respondent and therefore was not in the United Kingdom unlawfully when she made her application for leave to remain. He said that it was accepted by the First-tier Judge that the appellant met all the requirements of the immigration rules other than her immigration status requirement because she had only six months valid leave. He said that this was the only ground upon which the appellant's application was refused. The grant of exceptional assurance leave of two months, extended the appellant six months leave, giving her a total of eight months valid leave. He argued that the appellant therefore was not unlawfully in this country and met the immigration status requirement of the immigration rules.

35. I shall address this point in more detail, below. For the present purposes, I observe that these matters were not raised at the hearing before the First-Tier Tribunal but instead it was accepted by the appellant that she does not meet the status requirements of the immigration rules as she only had six months valid leave. It was also not raised in the ground of appeal, either expressly or by necessarily implication. The thrust in the grounds of appeal essentially was that the First-tier Tribunal Judge did not consider that the appellant would return to Bangladesh to make an entry clearance application as a lone woman which would put her at risk in Bangladesh. This was the ground upon which permission to appeal was granted although it was stated in the permission to appeal, that all grounds can be argued but are weak.

36. He was further argued that in the circumstances the **Chikwamba** principal was misapplied by the First-tier Tribunal Judge. The appellant is not an over stayer and that should have been considered paramount in the decision. The appellant has not overstayed her leave so there is little public interest in requiring her to return to Bangladesh to make an entry clearance application. There are enough positive factors in the appellant's case such as the husband's cancer and her mother-in-law's medical needs. The appellant would be a lone woman if returned to Bangladesh.

37. The respondent in his submission resisted all grounds of appeal. He stated that the Covid 19 policy does not feature in the procedural rigour which should be observed. He argued that the policy does not give the appellant substantive rights as the policy is clear that it is a short-term protection during the Covid pandemic. He submitted that at paragraph 22 the Judge stated that the appellant had conceded that she did not meet the immigration rules. There is no mistake by the Judge and fact and the appellant had no valid leave in the United Kingdom. She did not need the requirements of the immigration rules.

38. Grounds 1 and 3 overlap and it was argued that the Judge's primary conclusion was that the appellant's husband can return to Bangladesh with her and therefore the appellant will not be a lone female returning to Bangladesh. Therefore the appellant being a lone woman in Bangladesh was not an issue which arises in the appeal. The Judge took everything to account in respect of Article 8 balancing exercise and placed appropriate weight appropriately on all the issues.

39. In response to appellant's counsel submitted that that lone women in Bangladesh face problems and the CIPIN which demonstrated this, was before the Judge.

Decision on error of law

40. In considering this appeal I have taken into account all the documents and submissions made at the hearing. I have to determine whether the First-tier Tribunal Judge made a material error of law in his decision in respect of the proportionality assessment in Article 8 of the European Convention on Human Rights.

41. At the hearing, the appellant raised a new ground of appeal which was that the appellant was not unlawfully in this country, when she made her application, because she was given exceptional assurance leave by the respondent which extended her 6 month leave to 8 months and therefore fulfilled the immigration status requirement. It was stated that the immigration status requirement was the only

reason that the appellant's application failed as it was accepted that she had met all the other requirements.

42. In March 2020, during the COVID-19 pandemic, the respondent introduced a policy granting temporary leave for migrants, entitled "exceptional assurance leave", for those who could not leave the United Kingdom at the end of their leave to remain expired, due to the impact of the coronavirus pandemic. Exceptional assurance leave was introduced to provide short-term protection to those who could not leave the country, against any negative consequences of overstaying in the UK when returning to their home country was not possible.

43. The First-tier Tribunal Judge took into account this argument and stated that although the appellant visa expired on 21 August 2021, she applied and was granted "exceptional assurance leave" to remain in the United Kingdom until 20 October 2021. The Judge stated that this grant acted as a short-term protection against adverse action consequences after the appellant's visa expired but it did not constitute a further leave such that she could meet the immigration status eligibility requirements.

44. I find that the First Tier Tribunal Judge was correct when he found that the additional two months granted to the appellant as exceptional assurance leave did not count towards valid leave for the purposes of the immigration rules. The Judge stated that "in light of this, I accept that the appellant has not been in the United Kingdom unlawfully" which means that the appellant may have been in the United Kingdom lawfully, but nevertheless that did not meet one of the requirements of the immigration rules. The Judge made no material error in this finding that although the appellant was in the United Kingdom lawfully, she still does not meet the eligibility requirements of the immigration rules.

45. The purpose for granting exceptional assurance leave was introduced to provide short-term protection against any negative consequences of overstaying in the United Kingdom. This protects the appellant and can be used as a shield but cannot be used as a sword to gain further rights.

46. I find that the Judge made a fact sensitive analysis of the appellant's circumstances in an extensive and well reasoned decision. The Judge found that the appellant and her husband can relocate to Bangladesh for her to make an entry clearance application or remain there permanently. This was the primary finding in the decision.

47. The Judge took into account the appellant's case that she cannot return to Bangladesh because he needs to look after her mother-in-law who has health problems. The Judge stated that the appellant has

not provided sufficient medical evidence to show that the appellant's mother in law requires the day-to-day care as alleged by the appellant. The Judge found that other members of the family who live in the United Kingdom, can in the short term, look after the appellant's mother and therefore the appellant would not be sole woman returning to Bangladesh and the adverse consequences for a lone women in Bangladesh, will not apply to her.

48. The Judge took into account that the reason given by the husband for why he cannot return to Bangladesh with the appellant was because he has recently acquired a job in the motor industry. The Judge considered whether the appellant's husband can find a job in Bangladesh and stated that even if the appellant could not find a job equivalent to the one he has in the United Kingdom, that is not to say that he could not find any work at all.

49. The Judge also took into account that the husband had suffered from leukaemia in January 2019 and spent some time in hospital, followed by outpatient care. The Judge stated that there was no further medical evidence of continuing appointments or treatments and that the sponsor in his statement in support of the appellant's application describes himself as a cancer survivor who is in remission. I find that the judge give adequate reasons for why family life can be enjoyed by the appellant and her partner in Bangladesh.

50. The Judge found that the appellant and her partner would not face very significant difficulties which could not be overcome or would entail very serious hardship although accepting that it would be difficult. He said that the sponsor is a 36-year-old man and speaks some Bengali and is fluent English and has United Kingdom qualifications. The Judge accepted that his cancer diagnosis and treatment caused anxiety and that the appellant supports him that that her emotional support could continue in Bangladesh. The Judge noted that the appellant has been away from Bangladesh for only two years, is highly educated and is fluent in the Bengali language. She would be able to support her husband overcoming the difficulties he would face and they could continue family life in Bangladesh.

51. It is beyond doubt that the Judge correctly directed himself in law as to all relevant matters with which he was concerned and came to conclusions that were open to him on the evidence. He made no mistake of facts and his analysis of the law, as it applies to the facts. The appellant's appeal essentially challenges the Judge's evaluation of the case law and sought to argue that the case law supported the appellant's case.

52. The Judge considered the case of **Chikwamba** and **Younas** and grappled with the issue as to whether the appellant should return to Bangladesh to make an entry clearance application and also addressed the considerations in section 117B. The Judge stated that reliance on **Chikwamba** does not obviate the need to make an entry clearance application. The Judge did not understand that **Chikwamba** to say that those who will inevitably succeed in an entry clearance application should not have to return to their country of origin to make an entry clearance application. The Judge noted that a fact specific analysis is required as confirmed by the Court of Appeal in the case of **Alam**. The Judge stated that **Alam** but did not establish a general rule of law and that a full Article 8 analysis is required even when the applicant has been refused on a narrow procedural ground where the applicant had to leave and apply for entry clearance.

53. Whilst case law carries some weight in terms of general guidance, it is nevertheless clear that the Judge is tasked with assessing the evidence and making findings which was done in the decision. The Judge was entitled to find that the case law does not establish a general rule that because the appellant would meet the requirements of the immigration rules in her home country, she should not have to return to make an entry clearance application.

54. The Judge took into account the CPIN of 2020 in relation to sole women in Bangladesh, in the alternative, as his main finding was that the appellant and her husband can return to Bangladesh together while the appellant makes an application for leave to enter or that they can continue their family life in that country. Permission to appeal was granted on this issue as the permission Judge stated that it is arguable that the Judge did not take into account that the appellant will return to Bangladesh as a sole woman and therefore would face adverse consequences as outlined in the CPIN.

55. The Judge did not consider that the appellant would return to Bangladesh as a sole woman because in the decision he found that the appellant would not be a divorced or an unmarried woman as she is married and therefore any adverse consequences will not apply to her. I understand this to say that she will return with her husband to Bangladesh as the finding of the Judge was that they can return to Bangladesh.

56. The Judge found that the appellant does not meet the requirements of paragraph 276 ADE because she would not face very significant obstacles to reintegration in Bangladesh. The Judge took into account that the appellant has only been in this country for two years, is

educated to a high level and therefore can find a job and continue to give her husband emotional and financial support. These findings were open to the Judge on the evidence.

57. In respect of proportionality, the Judge found that the appellant established a relationship with her husband when her immigration status was precarious and took into account that maintenance of immigration control is in the public interest as set out in s117 of the 2002 Act. The Judge noted that the appellant and her husband accepted that they begin their relationship when they both knew that the appellant's immigration status was precarious. The Judge is mandated to take into account the public interest for those who start relationships when they only have short-term right to remain in the country. The judge had regard to all the relevant factors. It is not for me to substitute my own view of where the balance lies. Suffice it to say that I can see no error of law in the Judge's approach.

58. Having considered the decision of the First-tier Tribunal Judge, in the round, I am of the view that the First-tier Tribunal Judge did not fall into material error both in fact or in law. The appellant's appeal is no more than a quarrel with the First-tier Tribunal Judge's findings which he was entitled to make on the evidence before him.

Conclusion

59. I find that the First-tier Tribunal's decision stands.

DECISION

The appellant's appeal is dismissed

I make no anonymity orders
The appeal has been dismissed and there can be no fee order

Signed by

A Deputy Judge of the Upper Tribunal
Mrs S Chana Dated 28th day of June 2023