IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001161
First-tier Tribunal Nos: HU/59126/2023
LH/00127/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28th May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

AMINUL ISLAM AMIN
(NO ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Nasim, counsel, (instructed by Winston Rose Solicitors)
For the Respondent: Mr Wain, Senior Home Office Presenting Officer

Heard at Field House on 13 May 2024

DECISION AND REASONS

Background

1. This matter concerns an appeal against the Respondent's decision letter of 12 July 2023 ("the Refusal Letter"), refusing the Appellant's application made on 11 May 2022.

2. The Appellant applied on the basis of his private and family life, the latter with his partner and child in the UK.

3. The Respondent refused the Appellant's claim in the Refusal Letter. This stated that the Respondent considered the Appellant was not eligible to apply as a partner, parent or child under Appendix FM because (essentially) he had not shown that his partner had the requisite status in order to sponsor him. The claim was therefore considered under private life only. The letter said that the application failed on suitability grounds (S-LTR.2.2(b))

because the Appellant had applied for stateless leave without disclosing that he was not stateless but of Bangladesh nationality. The Respondent also did not accept that there would be very significant obstacles to the Appellant's integration into Bangladesh pursuant to immigration rule 276ADE(1)(vi). It was considered reasonable and section 55 compliant for his child to return to Bangladesh while the Appellant applied for the correct entry clearance.

4. The Appellant appealed the refusal decision.

5. His appeal was heard by First-tier Tribunal Judge Khan (the "Judge") by CVP on 9 February 2024. The Judge subsequently dismissed the appeal in her decision promulgated on 19 February 2024.

6. The Appellant applied for permission to appeal to this Tribunal on four grounds which may be described as follows:

   (a) Ground 1: The Judge erred in law by not allowing the Respondent an opportunity to consider the Appellant's claim under Appendix FM including the new matter of his partner's status. The Respondent had applied for an adjournment for this purpose, which was refused by the Judge. The Judge erred by going on to consider the Appellant's relationship despite not having jurisdiction to do so, as the Respondent had not consented to this 'new matter' being considered. Mahmud [2017] UKUT 00488 (IAC) and Quaidoo (new matter: procedure/process) [2018] UKUT 00087(IAC) relied on.

   (b) Ground 2: The Judge failed to address and record the detailed submissions of Appellant's counsel in relation to Appendix FM, paragraph EX.1 and the suitability provisions, which was procedurally unfair. Having refused the adjournment, it was incumbent on the Judge to resolve these issues and yet she appears to focus only on the issues set out in the Refusal Letter.

   (c) Ground 3: The Judge failed to address the submissions of Appellant's counsel regarding the suitability provisions and the Respondent's guidance on those provisions, leading to erroneous findings.

   (d) Ground 4: The Judge's findings were irrational and perverse in light of grounds 1-3 and the errors therein.

7. Permission to appeal on grounds 1-3 was granted by First-tier Tribunal Judge Handler on 15 March 2024, stating:

> "1. The application appears to be out of time by one day with no reason. As it is only one day out of time I exercise discretion to admit the application.
>
> 2. Ground 1 is arguable. It is arguable that the Judge did not provide adequate reasons for why it was considered fair to proceed without allowing the respondent an opportunity to consider the 'new matter' and did not provide adequate reasons for why it was found that the status of the appellant's wife was not a new matter, with reference to the case law cited in the grounds.
>
> 3. Ground 2 is headed 'procedural unfairness' but the substance of it is adequacy of reasons. It is arguable that the Judge did not give adequate reasons regarding EX.1, noting that 'insurmountable obstacles' was referred to in the issues in dispute (albeit not with reference to specific paragraphs of the immigration rules).

> 4. Ground 3 is arguable. Whilst the Judge has made findings regarding the suitability requirements, it is arguable that the reasoning is inadequate with reference to the burden of proof and the significance of the issue of suitability being referable to a previous application.
>
> 5. Ground 4 does not add to the above three grounds and without further particularisation is not arguable."

8. The Respondent did not file a response to the appeal.

The Hearing

9. The matter came before me for hearing on 13 May 2024 at Field House.

10. I questioned whether the Appellant had filed a bundle in accordance with the standard directions issued on 26 April 2024. Mr Nasim said that a bundle had been filed electronically on 10 May 2024 and showed me printouts confirming the same. Mr Wain had received and reviewed this bundle. Even though the bundle could not be found on the Tribunal case management system, I was satisfied from the evidence provided by Mr Nasim that the Appellant had attempted to file one (albeit belatedly), which Mr Wain had been able to review. I had in any event been able to locate the relevant papers on the First-tier Tribunal's case management system (CCD). Both representatives therefore agreed that the hearing could proceed on the basis that the CCD papers could be referred to in lieu of the bundle.

11. Mr Nasim took me through the grounds of appeal. He confirmed that, before the Judge, the Respondent had accepted that the Appellant's partner had a right of abode which was equivalent to settled status but that an adjournment had still been sought in order that the application considered under Appendix FM in light of this development. He said he was present at the appeal and the Judge did not ask the Respondent's representative whether consent to the 'new matter' of the partner's status was given. As consent was not given, the Judge had no jurisdiction to go on to consider the new matter, which she nevertheless did.

12. I noted that the grounds of appeal referred to a transcript of the hearing having been requested; I asked Mr Nasim what had happened with this. He said it appeared his instructing solicitors had not pursued this and he had not been asked to provide a witness statement either.

13. I asked Mr Nasim, in relation to ground 2, whether the Respondent had accepted that paragraph EX.1 of the immigration rules applied, and whether this was what the second issue in [7b] of the decision was referring to. He said there is no express reference to EX.1 in the decision; the Judge seemed unaware of the need to address both EX.1 and section 55 concerning best interests of the child. He said the submissions were very much on the basis of the Appellant's private life and seeking to address those issues raised in the Refusal Letter. He said had the Judge addressed EX.1 and found the Appellant succeeded, there would have been no need to go on to consider article 8 outside the rules. He said [40] and [41] of the decision are not sufficient to address EX.1, and the importance of the Appellant's child being British is not addressed at all.

14. As regards ground 3, he added that SLTR.2.2(b) of FM has to relate to the current application and not a previous application and so its inclusion even in the Refusal Letter was erroneous. Nevertheless, it was for the Respondent to discharge the burden of proving the allegation, which it had not as no evidence had been provided, and the Judge does not appear to have appreciated this.

15. I asked Mr Nasim how this error could be said to be material, given that the Judge appears only to consider suitability in [43]-[46], after having conducted the article 8 proportionality exercise. He said suitability should have been considered first and this was a further error (thus expanding on the grounds of appeal); assessment of the suitability provisions should have fed into the proportionality exercise.

16. Mr Wain replied to say the grounds of appeal are opposed because:

    (a) whilst it is accepted that the Judge erred in [5] by finding the wife's status was not a 'new matter', this error was not material because the Judge does not go on to make any findings about it, such as concerning EX.1. It would only be material had the Judge addressed the new matter and gone on to find the rules had been met which would have fed into the proportionality exercise. This did not happen. He clarified that there was a letter of grant to the Appellant's wife dated 1 August 2023 which postdated the Refusal Letter so could not have been assessed by the initial decision maker. It was agreed that the Respondent's review of 29 January 2024 (paragraph 17) indicated that the grant letter had still not been seen such that it appeared it had only been served for the first time in the Appellant's supplementary bundle for the hearing before the Judge. The Respondent therefore had not considered the evidence of the wife's status prior to the hearing, hence the adjournment request.

    (b) As regards ground 2, the Respondent did not take any position in relation to EX.1 at the hearing as it considered the wife's status was a new matter. There are no findings in relation to EX.1 and the child precisely because it was a new matter and the Judge did not deal with it so there is no error in this regard.

    (c) As regards ground 3, he accepted there was an error in the way that the Judge approached the suitability provisions i.e. dealing with them after making findings on article 8. He also accepted that the burden for proving the point lay with the Respondent such that the Judge further erred by not addressing this before expecting evidence from the Appellant. However, such errors are not material as the Judge found the Appellant did not meet the requirements of 276ADE and so failed to meet the immigration rules in any event. The Judge also did not refer to a failure to meet the suitability provisions when carrying out the proportionality exercise.

17. Mr Nasim responded to say that, for the wife's status, what had been relied upon was not the letter of grant in the supplementary bundle, but the entry clearance vignette in the wife's passport referring to her having a right of abode (Respondent's bundle page 34). He said the initial decision maker had not understood that this amounted to the wife being a British national under s.21(A) of the British Nationality Act 1981. He said the cover letter to the application had listed the wife's passport being enclosed, and he himself had provided the Judge with extracts from 'MacDonald's immigration law and practice' to explain the position. I asked him whether there was any explanation in any document besides or before these extracts as to what the vignette meant; he said no.

18. Mr Wain pointed out that the vignette bore an expiry date. Mr Nasim that there was no expiry date on the right of abode. Mr Nasim said that the Judge had found the partner's status not to be a new matter such that she needed to go ahead to consider EX.1 and the position of the wife and child, which she did not do.

19. At the end of the hearing, I reserved my decision.

Discussion and Findings

20. I remind myself of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law if it is found that the tribunal below has made a genuine error of law that is material to the outcome of the decision under challenge.

21. I also remind myself of the need for decisions to provide sufficient explanation and reasoning (see, for example, the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), including as to the origin of the point or evidence on which findings are based so as to avoid both confusion and further dispute in any onward appeal – see, for example, the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC).

22. As regards ground 1, the Appellant says that the Judge found the question of the Appellant's wife's immigration status to be a new matter, to which Respondent did not consent but the Judge went on to decide it anyway, which was a material error. The Respondent, on the other hand, argues that the Judge found it was not a new matter, which was an error, but this error was not material as the Judge did not go on to address it in any case. The parties therefore have very different views as to what the decision says and what errors it contains.

23. As was discussed at the hearing before me, the evidence of the partner's status that was before the initial decision maker appears to have been her passport which contained an entry clearance vignette stating "Certificate of Ent to Right of Abode" valid from 20/05/21 to 28/08/22. Mr Nasim confirmed that no explanation as to what this meant had been put forward in the cover letter to the application, nor at any point prior to Mr Nasim uploading the extract from Macdonald's Immigration Law and Practice on the day of the hearing.

24. The Refusal Letter stated that "you have provided no evidence of your wife Samsunnar Begum's immigration status; therefore this [sic] is not accepted she has settled status in the UK". Paragraph 17 of the Respondent's review dated 29 January 2024 states that:

> "The A states that his partner has Leave to remain status, in the UK. However, no evidence has been submitted to confirm this. Both the A and his claimed partner are Bangladeshi nationals and so too is their child (RB pages 29-35). There is nothing to prevent the family returning to Bangladesh as a family unit. The decision is reasonable and Section 55 compliant".

25. The Appellant filed a supplementary bundle on the day before the hearing which contained a printout of an email from the Home Office showing the Appellant's partner's name and stating that:

> "I am pleased to tell you that your application for a certificate of entitlement to right of abode has been approved…. Having right of abode means you are allowed to work or live in the UK without any immigration restrictions…."

26. The Respondent's position that no evidence had been provided to show that the Appellant's wife had settled status in the UK appears to have changed by the date of the hearing, as the Judge records in [40b] that:

> "I accept that his wife has a right of abode in the UK owing to her deceased father's immigration status. This is accepted by the Respondent also".

27. There is no dispute between Mr Nasim and Mr Wain that the Respondent accepted the Appellant's partner had a right of abode. The 'new matter' appears to be the question of the impact of this upon the Appellant in terms of the immigration rules. Both parties appear to agree that because of the right of abode, the Appellant fell for consideration under paragraph EX.1 of Appendix FM.

28. It is clear from both the Refusal Letter and the Respondent's Review that EX.1 had not been considered by the Respondent, the ostensible reason being that the Respondent was maintaining the position that no evidence had been provided proving the Appellant's partner status.

29. It is also clear that the Respondent considered there to be a new matter arising from the evidence of the partner's status as the Judge states in [5] that:

> "At the outset of the hearing, the Respondent's representative made an application for an adjournment on the basis that the Respondent now accepted that the Appellant's wife had leave to remain in the UK, and that this amounted to a 'New Matter' and therefore required separate consideration by the Respondent".

30. It was therefore incumbent upon the Judge to decide whether there was in fact a 'new matter'.

31. In that regard, section 85 of the Nationality, Immigration and Asylum Act 2002 states as follows:

> ..(4) On an appeal under section 82(1) ... against a decision [the Tribunal] may consider ... any matter which it thinks relevant to the substance of the decision, including ... a matter arising after the date of the decision.
>
> (5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
>
> (6)A matter is a "new matter" if—
>
> (a) it constitutes a ground of appeal of a kind listed in section 84, and
>
> (b) the Secretary of State has not previously considered the matter in the context of—
>
> (i)the decision mentioned in section 82(1), or
>
> (ii)a statement made by the appellant under section 120.

32. In the Upper Tribunal case of Mahmud [2017] UKUT 00488 (IAC), the Upper Tribunal rejected a submission that a 'new matter' meant a 'new ground of appeal'. It said that:

> "Practically, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter."

33. It is not for me to decide whether a new matter existed or not, but whether the Judge assessed this question correctly. I find she did not, which is an error. All she says in relation to it is:

> "I considered the application [for an adjournment], however, in view of the totality of the evidence submitted, I refused the application on the basis that I had sufficient evidence to hear the appeal. Further, I found that the wife's status did not strictly amount to a 'New Matter' as the Appellant's instructing solicitors had made reference to her status in earlier correspondence."

34. There is no reference to either Section 85 nor Mahmud. Whilst this is not an error in itself, there is no indication of what legal test(s) the Judge had in mind when addressing the question of the new matter. The only reason given as to why she considers there not to be a new matter is because the partner's status had been referred to in earlier correspondence. This reasoning is not sufficient.

35. The fact that the partner's status had been referred to previously was not in dispute. By the time of the hearing, it was also no longer in dispute that the partner's status was that she had a right of abode. What was still in dispute was what this meant for the Appellant, and which (if any) alternative or further immigration rules now fell to be considered as a result. As the Judge had found that there was no new matter such that the partner's status could be considered within the appeal, it was then incumbent on her to ascertain what immigration rules properly fell to be assessed, and to assess the Appellant pursuant to them. I do not consider that she did this, which is a further error.

36. The Judge states at [7] that:

> "The parties agree that I must resolve the following issues in disputes (taken from the Home Office (HO) Review decision):
>
> a) Does the Appellant satisfy the requirement of 276ADE(1)(iii) of the Immigration Rules. The Appellant must show that they are aged 18 or above and that there would be very significant obstacles to their integration into the country to which they would have to go if required to leave the UK.
>
> b) Has the Appellant established his private and family life in the UK and are there insurmountable obstacles to him re-integrating to life in his country of origin
>
> c) Whether the Appellant's application falls for refusal on the grounds of Suitability under Section S-LTR of Appendix FM of the Immigration Rules"

37. It appears clear from the words "taken from the Home Office (HO) Review decision" that the issues the Judge has recorded as needing to be resolved are those in dispute at the time of the review i.e. prior to the parties' agreement that the Appellant's partner had evidenced a right of abode. This is further supported by the list of issues in [7] being identical to those contained in paragraphs 4-7 of the review.

38. As discussed at the hearing before me, the issue set out in [7b] of the Judge's decision is very oddly phrased and it is not clear which immigration rule is being referred to in describing "insurmountable obstacles to him reintegrating". Integration is the question applicable to 276ADE(1)(vi), which requires very significant difficulties, whereas insurmountable obstacles is the question applicable to EX.1 concerning family life continuing outside the UK. The issue appears to be a conflation of the two rules/tests.

39. The fact that this conflation is carried into the decision is supportive of the view that the Judge did not properly ascertain which immigration rules fell to be assessed. Without having done this, it cannot be said that the Judge dealt with all of the issues in dispute. Indeed,

having referred to the oddly-phrased issue at [7b], there appears to be no further reference to 'insurmountable obstacles' within the decision.

40. Bringing it all together, in my judgment the Judge found there was no new matter, but accepted that the partner had a right of abode and yet did not properly go on to address what that meant, whether in terms of EX.1 or otherwise. The errors that resulted stemmed not only from an improper assessment of whether there was a new matter but also from the Judge's refusal to grant the requested adjournment, both of which resulted in unfairness to both parties. Rightly or wrongly, the Respondent had not considered the impact of the wife's status prior to the hearing. The Judge appears to think that the Respondent had had the opportunity to consider the matter already given the status had been mentioned in correspondence. However, as above, the Appellant's supplementary bundle containing the proof of status was only filed the day before the hearing and there was a lack of any explanation of the meaning of that status before this time, beyond simply producing her passport. Refusing to adjourn meant that the Appellant did not get the potential benefit of the Respondent having the time to conduct a further, properly considered, review of the matter in light of the new evidence. Even putting the case back in the list may have provided enough time for such a review; I do not know. Instead, it appears that the Judge thought acceptance of the wife's status did not change the substance of the appeal at all and she considered she had sufficient evidence on which to decide all the relevant issues. Those issues are then both unclearly characterised in the decision and did not accurately reflect the issues the parties now considered required resolving.

41. The errors I have found are material because the assessment of whether the Appellant met the requirements of the applicable immigration rules fed into the overall article 8 proportionality exercise. At [38b] the Judge finds that "The Appellant is unable to meet the Immigration Rules". Had the Judge properly ascertained which immigration rules applied (which may have included EX.1), it may be that she would have found the relevant requirements were met. If so, this would have been determinative for the purposes of the proportionality exercise under article 8. If the Appellant's child were found to be British, this would also have been relevant for the purposes of section 117B(6) of the 2002 Act, which again would have fed into the proportionality exercise. The proportionality exercise as a whole is therefore infected.

42. It follows that ground 1 is made out.

43. As I have already found material error, I do not need to go on to consider the other grounds but do so briefly for the sake of completeness.

44. As regards ground 2, I have already addressed that part of the ground which discusses the Judge failing to assess the Appellant under EX.1 of Appendix FM. The remaining part of the ground alleges that the Judge failed to address and record detailed submissions the Appellant's counsel made on Appendix FM, paragraph EX1 and the suitability provisions.

45. In terms of the submissions, the Judge at [9] states:

> "I heard oral submissions from the Respondent's representative who sought to rely on the Reasons for Refusal Letter (RFRL) and the HO Review decision. I also heard oral submissions from the Appellant's representative who sought to rely on the Appellant's Skeleton Argument (ASA)."

46. At [16] she states that:

> "I have taken into account all the evidence and submissions even where something is not expressly referred to."

47. There is no other description of the submissions made by either representative. Whilst Mr Nasim said various things were mentioned in submissions, it was not for him to give evidence and I have not been provided with any notes of the hearing before the Judge, nor any transcript or recording of the same. The Appellant should perhaps have had regard in advance of the hearing to the guidance given in BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC). I appreciate that BW arose in a different context (allegations of judicial bias) but it is no less relevant to the issue of evidence about what occurred at a previous hearing. I therefore do not accept it has been shown that the submissions said to have been made concerning Appendix FM, paragraph EX1 and the suitability provisions were made to the Judge.

48. It follows that I find ground 2 is only made out insofar as it refers to the judge having erred by failing to assess the Appellant under EX.1 of Appendix FM insofar as this was necessary.

49. As regards ground 3, Mr Wain for the Respondent accepted that the Judge erred in failing to first ascertain whether the Respondent had discharged its burden of proof in saying the Appellant had previously applied on the basis of being stateless. Mr Wain said that this error was not material because the Judge did not take this into account when conducting the proportionality exercise, only addressing suitability afterwards.

50. Ground 3 simply says that the Judge failed to address the submissions Appellant's counsel made on the issue of suitability without discussing how this amounts to an error of law. Mr Nasim sought to expand on the ground at the hearing by saying the Judge further erred by not considering suitability prior to proportionality. Whilst I am aware that I should not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them as this could lead to unfairness (see R (Talpada) v Secretary of State for the Home Department [2018] EWCA Civ 841), I do not consider any unfairness is caused here by allowing this point to be argued as it is something Mr Wain also spotted and made submissions on.

51. I repeat my findings in relation to that part of ground 2 which relates to submissions. I have no evidence of any submissions Appellant's counsel may have made on the issue of suitability and so do not find it proved that they were made.

52. However, it was a clear error for the Judge to only consider the suitability provisions of the immigration rules (in [43]-[46]) *after* having conducted the article 8 proportionality exercise (in [37]-[42]) as this was "putting the cart before the horse". It is hard to understand why the Judge did this considering she had correctly said at [10] that:

> "The Tribunal is still required ordinarily to undertake a two-stage assessment. First, to assess whether the decision under appeal was in accordance with the Immigration Rules. Second, to assess whether the decision was contrary to the Appellant's Article 8 rights."

53. It was also an error not to assess whether the Respondent had evidenced its allegation in the Refusal Letter that the Appellant had previously applied on the basis of being stateless. Without supporting evidence, this allegation was in the nature of submissions only.

54. Having said that, I find these errors are not material precisely because the Judge did not take account of the adverse suitability finding in the proportionality exercise; there is simply no mention of it.

55. It follows that I find that ground 3 is not made out.

56. In terms of preserving findings, I have considered the guidance in AB (preserved FtT findings; Wisniewski principles) Iraq [2020] UKUT 00268 (IAC). The Respondent did not make submissions that any particular findings could/should be preserved. The Judge's findings in [17]-[33] concerning very significant obstacles to integration under immigration rule 276ADE have not been challenged. On the face of it, it is difficult to see why these findings should not be preserved as they appear sound and the question of the Appellant's own integration into Bangladesh is arguably separate from the question of whether there would be insurmountable obstacles to family life with his partner and child continuing in Bangladesh. However, there is mention of the role the Appellant plays in caring for the child in [24], and there is reference within the findings under 276ADE to credibility, which may have been infected by the Judge's conclusions concerning suitability (albeit suitability was considered separately). Ultimately, I do not know whether the Judge's assessment and conclusions under 276ADE would have remained the same without the material errors I have found. Overall, it therefore seems to me that the fairest thing to do is to not preserve any findings.

Conclusion

57. I am satisfied the decision of the First-tier Tribunal did involve the making of errors of law.

58. I find the errors found infect the decision as a whole such that it cannot stand. I preserve no findings.

59. In the light of the need for extensive judicial fact-finding, and having regard to paragraph 7(2) of the Practice Statements of the Immigration and Asylum Chambers of the First tier Tribunal and the Upper Tribunal as well as Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I am satisfied that the appropriate course of action is to remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than Judge Khan. This is particularly the case given the very rules requiring assessment need ascertaining.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues. No findings of fact are preserved. The Respondent would be well advised to conduct a further review of the matter as soon as possible, and in any case in advance of a new hearing, to make clear his position as to:

    (a) what the Appellant's partner's right of abode means in practical terms (i.e. whether it is accepted as being equivalent to British citizen status or some other type of leave, which type should be specified for each of her and the child);

(b) which immigration rules he considers apply to the Appellant; and

(c) whether it is considered that the Appellant meets those rules.

3. No anonymity order is made.

L.Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
16 May 2024