



IAC-AH-KEW-V1

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

Appeal Number: IA/50866/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 12th November 2015**

**Decision & Reasons Promulgated
On 16th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RENTON

Between

**JABIN BEGUM POLY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pretzell, Counsel, instructed by Makka Solicitors Limited

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a female citizen of Bangladesh born on 10th December 1987. She first arrived in the UK on 25th May 2013 when she was given leave to enter as a visitor until 21st October 2013. On 18th October 2013 the Appellant applied for leave to remain as the spouse of a British citizen, the Sponsor Capitan Miah. That application was refused for the reasons given in a Notice of Decision dated 15th November 2013. At the same time

the Respondent decided to remove the Appellant under the provisions of Section 47 Immigration, Asylum and Nationality Act 2006. The Appellant appealed that decision, and that appeal was allowed by the First-tier Tribunal on 5th September 2014. However, the Respondent successfully appealed that decision to the Upper Tribunal which on 1st December 2014 remitted the appeal again to the First-tier Tribunal. Hence the appeal came before First-tier Tribunal Judge Del Fabbro (the Judge) sitting at Taylor House on 7th May 2015. He decided to allow the appeal on Article 8 ECHR grounds for the reasons given in his Decision dated 2nd June 2015. The Respondent sought leave to appeal that decision, and on 3rd September 2015 such permission was granted.

Error of Law

2. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside. It is to be noted that when the appeal came before Judge Del Fabbro it was agreed between the parties that the original finding of the First-tier Tribunal that the Appellant and the Sponsor enjoyed a genuine and subsisting relationship was to be preserved. It was further agreed that the Appellant could not succeed under the Immigration Rules HC 395 and in particular paragraph 276ADE and Appendix FM thereof. Therefore the only issue before Judge Del Fabbro was whether the Respondent's original decision amounted to a disproportionate breach of the Appellant's Article 8 ECHR rights.
3. The Judge allowed the appeal because he found that the Appellant satisfied all the requirements for leave to remain in the UK as the spouse of the Sponsor except for paragraph E-LTRP.2.1 of Appendix FM known as the "switching prohibition." In other words, the only defect in the Appellant's application for leave to remain was that having been granted leave to enter as a visitor, the Rule prevented the Appellant from obtaining leave to remain as a spouse. The Judge found this to be an exceptional circumstance allowing consideration of the Appellant's Article 8 ECHR rights. The Judge then went on to find that the Appellant had a family and private life in the UK which would be interfered with by the Respondent's decision so as to engage the Appellant's Article 8 ECHR rights. Finally the Judge found that such interference was disproportionate.
4. At the hearing before me, Mr Whitwell submitted that in coming to that decision, the Judge had erred in law. He referred to the grounds of application and argued that the Judge had failed to appreciate that it was a fundamental element of the relevant Immigration Rule that the Appellant was not present in the UK when seeking leave as a spouse. The Judge had allowed the appeal on a "near miss" basis because the Appellant had met all the requirements of the relevant Immigration Rule except for this provision. This was an error of law. The Judge had not carried out a proper balancing exercise. He had not considered all the relevant factors, only the "near miss." The Judge had not assessed the weight to be attached to the public interest, and had made only a passing reference to

the factors contained in Section 117B of the Nationality, Immigration and Asylum Act 2002. It was apparent from the decision in **R (On the Application of Chen) v SSHD (Appendix FM - Chikwamba - Temporary Separation - Proportionality) IJR [2015] UKUT 00189 (IAC)** that more was required.

5. In response, Mr Pretzell referred to his Skeleton Argument and submitted that there was no such error of law. He argued that there was no good reason to require this Appellant to return to Bangladesh in order to apply for entry clearance as a spouse from there because she satisfied all of the other requirements of Appendix FM. For that reason the Judge had found the decision of the Respondent to be disproportionate. In doing so, the Judge was doing no more than following the decision in **Chikwamba [2008] UKHL 40** as explained in **SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054**. In the latter case, Elias LJ said as follows:

“(a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.

(b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.”

6. Applying that decision, it had not been necessary for the Judge to carry out a full assessment of proportionality in this case as he found there was no good reason to require the Appellant to return to Bangladesh to seek entry clearance there, particularly as she met the requirements of the relevant Immigration Rule. In any event, the Judge had considered the weight to be attached to the public interest when he wrote at paragraph 31 of the Decision that he had had regard to the provisions of Section 117B of the 2002 Act.

7. I do find an error of law in the decision of the Judge so that it should be set aside. It is apparent that the Judge found the decision of the Respondent to be disproportionate because the Appellant’s application for leave to remain only failed because of the “switching prohibition” contained in paragraph E-LTRP.2.1. In my view that is an insufficient reason. The case of **Hayat** was decided before the introduction of Appendix FM, and I do not think that the provision contained in paragraph E-LTRP.2.1 can be considered a “procedural ground” as referred to in **Hayat**. In any event, in that case Elias LJ went on to write:

“(c) Whether it is sensible to enforce that policy will necessarily be fact-sensitive; Lord Brown identified certain potentially relevant

factors in **Chikwamba**. They will include the prospective length and degree and disruption of family life and whether other members of the family are settled in the UK.

- (d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance.”

8. Further, in **Chen** it was decided as follows:

- “(i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case law concerning **Chikwamba v SSHD [2008] UKHL 40.**”

9. It is therefore apparent that in considering proportionality, it is not sufficient to merely take into account a “near miss.” All the relevant factors including those relating to the public interest and in particular Section 117B of the 2002 Act must be taken into account. This the Judge failed to do. There is reference at paragraph 30 of the Decision to some very brief details of the Appellant’s family, but there are no findings at all as to the degree of interference to the Appellant’s family life of requiring her to return to Bangladesh to seek entry clearance from there. There is no evidence to sustain the finding of “significant interference” made at paragraph 33 of the Decision. Further, the public interest merits only a passing reference at paragraph 31 of the Decision where the Judge decided that it attracted only “little countervailing weight” because there was no sensible reason to expect the Appellant to return to Bangladesh. This amounts to an insufficient consideration of the weight to be attached to the public interest. For these reasons, the Judge’s consideration of proportionality is flawed and amounts to an error of law.
10. At the hearing, I reserved my error of law decision which I have now made. The decision of the First-tier Tribunal is set aside and will have to be re-made. I decide that it should be re-made in the First-tier Tribunal in accordance with paragraph 7.2(b) of the Practice Statements. For that purpose the original finding that there is a genuine and subsisting relationship between the Appellant and the Sponsor is preserved.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

The decision will be re-made by the First-tier Tribunal.

Anonymity

The First-tier Tribunal made an order for anonymity. There was no application to me to continue that order and I find no reason for it to be continued. I lift the order.

Signed

Date

Upper Tribunal Judge Renton