



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: IA/50866/2013**

Appeal

THE IMMIGRATION ACTS

**Heard at: Field House
On: 1st December 2014**

**Determination
Promulgated
On: 3rd December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

Jabin Begum Poly

Respondent

For the Appellant: Mrs Pal, Senior Home Office Presenting Officer
For the Respondent: Mr A Pretzell, Counsel instructed by Makka Solicitors Ltd

DETERMINATION AND REASONS

1. The Respondent is a national of Bangladesh date of birth 10th December 1987. On the 5th September 2014 the First-tier Tribunal (Judge Herbert) allowed her appeal against a decision to refuse to vary her leave to remain and to remove her from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006. The Secretary of State now has permission to appeal against that decision¹.
2. The appeal before the First-tier Tribunal concerned Ms Poly's application to remain in the United Kingdom on the basis of her marriage to a British national. She had arrived as a visitor in April

¹ Permission granted on the 23rd October 2014 by First-tier Tribunal Judge Foudy

2013 and in August 2013 married (according to Islamic Law) a Mr Kaptan Miah, a man she claims to have met after her arrival. On the 1st October 2013 they married according to UK law. They wish to remain living in the UK rather than returning to Bangladesh because Ms Poly is fearful of her former husband's family.

3. The Secretary of State rejected the application on the basis that Ms Poly could meet neither the requirements relating to private life (paragraph 276ADE) nor family life (Appendix FM). It was not accepted that this was a genuine and subsisting marriage. As to paragraph EX.1 the Secretary of State did not consider it to apply, but notes that even if it had done, the application would fail because Ms Poly could not meet the eligibility requirement in paragraph E-LTRP.2.1 ("no switching" from visitor status). The Secretary of State considered whether there are any exceptional circumstances and finds that there are not. The refusal letter concluded with a paragraph advising the steps that Ms Poly would need to take if she wished to claim international protection.
4. The First-tier Tribunal found that this is a genuine and subsisting marriage. It found that Mr Miah would have to give up his job, home, family and private life in the UK in order to relocate to Bangladesh. He would have no equivalent resources there. The First-tier Tribunal considered these factors to cumulatively amount to an "insurmountable obstacle". On that basis the First-tier Tribunal found that paragraph EX.1 of Appendix FM is engaged and allowed the appeal.
5. The central ground of appeal is that the First-tier Tribunal erred in apparently treating EX.1 as "free-standing" when in fact it could only be considered if Ms Poly had met the relationship, suitability and eligibility requirements as a partner under FM. Since she did not, EX.1 was not relevant to the decision. This had been made clear in the refusal letter. This ground is made out. The Tribunal was perhaps not aware of the decision in Sabir (Appendix FM - EX.1 not free standing) [2014] UKUT 00063 (IAC). That decision interprets Appendix FM in exactly the manner that the ground contend it should be read. If an appellant cannot meet the eligibility requirements, the provision is not engaged.
6. Mr Pretzell conceded that this is the case. He acknowledged that Ms Poly had never advanced any claim to be able to meet the eligibility requirements. Her case had always been based on Article 8 outside of the Rules. It is her case that she meets all of the requirements of FM bar eligibility and that there are particular reasons why it would be very onerous for her to return to Bangladesh to apply for entry clearance. She relies on Chikwamba v SSHD [2008] UKHL 40 It would appear that little consideration has been given to any of that.
7. The parties therefore agree that the decision of the First-tier Tribunal cannot stand. I am remitting this matter to the First-tier Tribunal to

be remade, and I do so for two reasons. First of all, the extent of judicial fact finding required. Mr Pretzell tells me that there are up to 4 witnesses (including Ms Poly) who would like to give evidence, and that an interpreter would be required. Secondly because the case advanced by Ms Poly before the First-tier Tribunal was not given proper consideration in this determination and she is therefore entitled to a fair and effective first-instance hearing.

Decisions

8. The determination of the First-tier Tribunal contains errors of law and it is set aside.
9. The decision in the appeal is to be remade in the First-tier Tribunal.

Deputy Upper Tribunal Judge Bruce
1st December

2014