



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

Appeal Number: IA040582015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 17 May 2016**

**Decision &  
Promulgated  
On 8 June 2016**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE MCGEACHY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

**CHOWDHURY FAZLE NOOR RAHAT**

Appellant

Respondent

**Representation:**

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer  
For the Respondent: Mr M K Mustafa, of Messrs Kalam Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Graham who in a determination promulgated on 15 October 2015 dismissed the appeal brought by Mr Chowdhury Fazle Noor Rahat against a decision of the Secretary of State on immigration grounds but allowed the appeal on human rights grounds.

2. Although the Secretary of State is the appellant before me, I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier. Similarly I refer to Mr Chowdhury Fazle Noor Rahat as the appellant as he was the appellant before the First-tier Judge.
3. The appellant is a citizen of Bangladesh born on 27 July 1991. He entered Britain as a student in September 2010 and had leave to remain in that capacity until 30 September 2014. He applied on 27 October 2014 for leave to remain on the basis of his family and private life in Britain. His application was considered under Appendix FM and paragraph 276ADE(1) of the Immigration Rules. The application was refused on 12 January 2015. In a detailed letter of refusal it was stated that the appellant could not meet the requirements of Sections EX.1(a) and (b) and EX.2 of Appendix FM. Although it was acknowledged that the appellant's partner had lived in Britain all her life and was in employment here it was pointed out that that did not mean that they could not live together in Bangladesh - there was no evidence that there were insurmountable obstacles in accordance with EX.2 preventing the appellant from continuing his relationship in Bangladesh. The appellant therefore could not meet the requirements of Section R-LTRP.1.1(d) and his application was refused under Section D-LTRP.1.3. It was also considered that the appellant could not qualify under the private life provisions and indeed there were no exceptional circumstances which would mean that he was entitled to leave to remain.
4. The Immigration Judge having noted the terms of the refusal found that the appellant could not meet the requirements of the Rules: indeed she stated that the appellant accepted that he could not meet the financial requirements for the application and that he sought to rely on a statement of additional grounds varying his application on the basis that he should be considered as a partner under the five year route. The judge went on to say that the appellant could not meet the evidential requirements of the application and that as he had failed to provide mandatory evidence his application under Appendix FM could not succeed and was dismissed.
5. In paragraph 13 she stated that having considered the appellant's private life she was satisfied that there were no very significant obstacles to his reintegrating into life in Bangladesh.
6. However she went on to state that she was entitled to consider the rights of the appellant under Article 8 outside the Rules. She referred to Section 117A(2) and Section 117B of the Immigration Act 1974 and said that she was required to carry out a balancing exercise as to whether or not the appellant's circumstances engaged Article 8 of the ECHR and that she should decide whether the proposed interference was proportionate in all the circumstances.
7. Having noted the terms of Section 117B she accepted that little weight should be given to private life establishment by a person at a time when

the person's immigration status is precarious but she went on to say that she accepted the submission that had he provided the mandatory evidence required he could have satisfied the Immigration Rules as a partner under the five year Rule. She said that she did not accept that the appellant's presence in Britain had been precarious and therefore attached weight to his family and private life established in Britain. She indicated that she took into account the fact that the appellant spoke English and would be able to work here and considered that he would not be a burden on the taxpayer.

8. In paragraph 18 she stated that, balancing the public interest in requiring the appellant to return to Bangladesh against the public interest in allowing him to remain in Britain, she found that refusing the appeal and requiring the appellant to return to Bangladesh was a disproportionate interference with his right in respect of his family life. She therefore allowed the appeal on Article 8 grounds.
9. The grounds of appeal, on which Mr Avery relied at the hearing pointed out that the judge had accepted there were no very significant obstacles to the appellant reintegrating into life in Bangladesh and emphasised that she had not made a finding that there were insurmountable obstacles or compelling circumstances to prevent family life from continuing elsewhere. He pointed out that the requirements for entry into Britain were mandatory and were ones which the appellant and the sponsor had been fully aware of when making the application. It was emphasised that Article 8 could not be used as a means to circumvent the Immigration Rules.
10. Permission was granted by First-tier Tribunal Judge Collier.
11. At the hearing of the appeal before me Mr Avery emphasised that the judge had found that the appellant could not meet the requirements of the Immigration Rules. He referred to the determination of the Tribunal in **AM (Section 117B) Malawi [2015] 260 (IAC)** which made it clear in the head note that "A person's immigration status is 'precarious' if their continued presence in the UK will be dependent upon their obtaining a further grant of leave". Moreover he added that nowhere had the judge identified any compelling reasons outside the Rules - this was clearly a requirement which had been emphasised by the Court of Appeal in **SS (Congo) [2015] EWCA Civ 387**. There was no evidence whatsoever that family life could not be considered elsewhere. In any event he suggested that a further application could be made in Britain should the appellant be able to meet the requirements of the Rules.
12. In reply Mr Mustafa referred to paragraphs 44 to 46 of **SS (Congo)** as a starting point. He accepted that that judgment referred to an appellant requiring, if they could not meet the requirements of the Rules an arguable case outside the Rules that there were compelling circumstances which should lead to a grant of leave to remain.

13. He stated that the judge had accepted that the appellant would be able to meet the “five year Rule” and went on to say that although the other judge had not identified any compelling factors these were clearly in her mind when she set out the relevant factors in paragraph 18 of the determination. He argued that therefore there was no material error of law in the determination.

### **Discussion**

14. I consider that there are material errors of law in the determination. It is clear that the judge found that the appellant could not meet the requirements of the Rules. Moreover she found that there were no insurmountable obstacles to the appellant and his wife living in Bangladesh. Indeed there appear to be no obstacles to the appellant making an application from Bangladesh to return to Britain should, as the judge indicated - although she merely stated that he might meet the requirements of the Rules - he might well be entitled to do.
15. The reality however is that the judge gave no indication of any compelling or other factors which would mean that the appellant’s appeal should be allowed on Article 8 grounds. What is written in paragraph 18 does not begin to show an arguable case that the appellant should be given leave outside the Rules on Article 8 grounds. The judge has not indeed focused on any compelling or other factors which would mean that was appropriate. She was, moreover, clearly wrong when she stated that the applicant’s private life was not precarious.
16. For these reasons I set aside the decision of the judge.
17. Mr Mustafa asked that I remit the appeal so that the appellant could put forward evidence that it would be inappropriate to expect him to leave the country. I agree to that course of action. I consider that the requirements of the Senior President of the Tribunal’s Direction are, just, met in this case.
18. This appeal is remitted to be heard de novo in the First-tier.

### **Notice of Decision**

The Secretary of State’s appeal is allowed to the extent that the appeal is remitted to the First-tier for a decision afresh on the issue of the rights of the appellant under Article 8 of the ECHR.

No anonymity direction is made.

Signed

Date 8<sup>th</sup> June 2016

Upper Tribunal Judge McGeachy