



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/19694/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 12 June 2017

Decision & Reasons Promulgated  
On 19 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

ABU SAYEED EMRAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khan, Londonium Solicitors

For the Respondent: Mr Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

**Background**

1. The Appellant is a national of Bangladesh who was born on 6 September 1986. He entered the United Kingdom on 27 October 2009 with entry clearance as a student and was granted extensions of student leave until 27 June 2015. On 22 December 2014 he made a human rights application for leave to remain in the United Kingdom on the basis of his marriage to a British Citizen. His application was refused by the Respondent who concluded that he did not meet the requirements of the partner route. The Respondent reached this conclusion because he did not meet the suitability requirements as his student leave had been curtailed so as to expire on 19 April 2014. Further, the Respondent was not satisfied that he met the income threshold of £18,600 and concluded that the English language test certificate did not meet the requirements of Appendix O. The Respondent also concluded that the Appellant did not meet the

requirements of paragraph 276ADE of the Immigration Rules as he did not meet the length of residence requirements and there would be no very significant obstacles to his integration into Bangladesh.

2. The Appellant appealed that decision to the First-tier Tribunal under section 82 of the Nationality, Immigration and Asylum Act 2002 (NIAA). His appeal was dismissed by First-tier Tribunal Judge O'Keefe in a decision promulgated on 6 September 2016. The Appellant sought permission to appeal against this decision and permission was granted by First-tier Tribunal Judge Shimmin on 3 January 2017. In granting permission, Judge Shimmin found that it was arguable that the Judge had found the curtailment decision was served in circumstances short of the requirement of actual communication to the person concerned. He also found that it was arguable that the Judge materially erred in the assessment of Article 8. First-tier Judge Shimmin did not find it arguable that the First-tier Tribunal misapplied the burden of proof in respect of the decision to curtail leave or that he erred in treating the factors taken into account under section 117B of the NIAA factors as neutral.
3. The grounds in respect of which permission to appeal was granted argued that the Judge accepted that the Respondent had not been able to prove that the curtailment decision was communicated to the Appellant but nevertheless concluded that the Respondent had proved effective service of the decision because it was sent by recorded delivery post and "there was no evidence before [the Judge] to show that the recorded delivery letter had been returned to the Respondent". It was argued that the approach was flawed because it was for the Respondent to prove that the decision was communicated in order to be effective. It was further argued that the Judge's findings on whether the Appellant had valid leave at the time of making the application infected the assessment of the proportionality of removal. It was further contended that the assessment was flawed as it was accepted by the Respondent that that sponsor's earnings met the income threshold requirement of £18,600 as at the date of the decision and it was accepted by the Judge that the Appellant met the English language requirements.
4. At a hearing on 14 February 2017 I found that there was a material error of law in the decision of the First-tier Tribunal for the following reasons which are recorded at paragraphs 12 and 13 of the decision:

"There was no evidence before the First-tier Tribunal that the letter curtailing the Appellant's leave had been signed for and consequently the finding that the notice curtailing his leave was communicated and the Appellant was without leave when he made his application was an error of law.

The Respondent argues that this error was not material because it did not impact on the First-tier Tribunal's Article 8 assessment. The First-tier Tribunal did take the Appellant's absence of leave into account at paragraph 36 of the decision in the assessment under Part 5A of the NIAA 2002. Section 117 B of the NIAA 2002 provides that little weight should be given to a relationship with a qualifying partner that is established at a time when the person is in the United Kingdom unlawfully. The Appellant's partner as a British Citizen was a qualifying partner and I consider that the First-tier Tribunal having referred to the absence of leave in paragraph 36 had this in mind. In the circumstances I conclude that the error was material as

it is also clear that given the Appellant's leave had not been curtailed that he also met the suitability findings of the Rules and on the Judge's findings met the English language requirement. On his case he also met the financial requirements at the date of the hearing. I therefore find that the Article 8 assessment was flawed as it failed to take into account relevant factors."

5. I set aside the decision of the First-tier Tribunal and adjourned with directions for the remaking of the decision in the appeal.

### **The Re-making of the decision in the appeal**

#### **The Parties submissions**

6. Mr Singh accepted that it appeared from the Appellant's bundle that he met the financial requirements of the Rules. However, if the documentation did not meet the rules there were no insurmountable obstacles to return and nothing to suggest that there was no support from families in Bangladesh.
7. Mr Khan said that it was accepted that the relationship was genuine. The First-tier Tribunal had accepted that the English language requirements were met and the financial requirements were now met. The financial evidence covered the end of December 2016 to May 2017 and showed the Appellant's wife's gross income was just over £19,000. As of today's date the Appellant satisfied all of the requirements of the Rules. Mr Singh was not taking issue with that. Given that he met the requirements it could not be proportionate to return him. He referred me to paragraph 51 of **Agyarko** and submitted that there was no public interest in his removal. The Appellant was here lawfully. His application would succeed if he made it today. There was no burden on public funds and with regard to the s117B considerations he had been here lawfully throughout.

#### **Discussion**

8. The Appellant claims that he now satisfies the requirements of the Immigration Rules. The Appellant's appeal is on human rights grounds only against the refusal of a human rights claim under the Immigration, Nationality and Asylum Act 2002 (section 82 and 84). The jurisdiction of the Tribunal in relation to appeals on Article 8 grounds was considered in respect of visit visa cases and by analogy the approach here should be the same. In **Kaur (visit appeals; Article 8)** [2015] UKUT 00487 the Upper Tribunal held that the Article 8 decision on an appeal cannot be made in a vacuum. Whilst judges only have jurisdiction to decide whether the decision is unlawful under s.6 of the Human Rights Act 1998 the starting-point for deciding that must be the state of the evidence about the appellant's ability to meet the requirements of the immigration rules.
9. In addressing the questions in **Razgar** [2004] UKHL 27 I accept that the Appellant has a genuine and subsisting relationship with his wife which amounts to family life for the purposes of Article 8. The Respondent did not contend in the RFRL that the relationship requirements were not met. I accept that they married on 5 February 2015 and have been living together since then. I also find that the proposed interference is

of sufficient gravity to engage the operation of Article 8 and that the interference is in accordance with the law and necessary in a democratic society. The remaining question is therefore whether the interference is proportionate to the legitimate public end sought to be achieved.

10. My starting point in terms of proportionality is whether the Appellant can satisfy the immigration rules. The requirements for limited leave to remain as a partner are set out at R-LTRP and require the satisfaction of the suitability requirements and the eligibility requirements which include relationship requirements; immigration status requirements; financial requirements and English language requirements. It is not in issue that the Appellant satisfies the relationship requirements. The Respondent also accepted that he met the suitability requirements. His application was refused by the Respondent because the Respondent concluded that his leave was curtailed so as to expire on 19 April 2014. I have found that his leave was not curtailed for the reasons given in my decision in relation to the error of law. On my findings therefore the Appellant was not in the UK in breach of immigration laws when he applied for leave to remain on the basis of marriage. The Respondent concluded in the RFRL that he was unable to meet the financial requirements of the Rules because although he had provided some evidence of an income of £19,800 at the date of the application, at the time of the application his spouse had been in employment for a period of five months. It was accepted that she had worked for longer than six months at the date of the refusal, however, only evidence provided with the application could be accepted for consideration. Further, the bank statements submitted by the Appellant did not show all of the funds being paid in. At the hearing before the First-tier Tribunal it was accepted by the Appellant's representative that the Appellant did not meet the financial requirements of the immigration rules as the Appellant's wife had not been employed in both her jobs for more than 6 months at the date of the application.
11. The First-tier Tribunal found that the Appellant met the requirements of Appendix O in relation to the English Language requirement of the Rules (E-LTRP.4.1) and that finding stands.
12. The immigration rules in relation to specified evidence are at Appendix FM-SE and require, in the case of salaried employment, that an applicant must produce payslips for a period of 6 months prior to the date of the application; a letter from the employer who issued the payslips confirming the salary; the length of the employment; the period they were paid; the level of salary relied on and the type of employment. Additionally personal bank statements corresponding to the same period must be provided. The evidence must be submitted with the application and dated no earlier than 28 days before the application.
13. The formal requirements of Appendix FM-SE could not be met at the date of the application as the Appellant's wife was unable to provide the specified evidence of her employment. The Appellant's wife has two sources of income, namely from Lion Heating Ltd and Poundland Ltd. Her P60s for the tax year to April 2017 show that she received £12,822.20 from Poundland Ltd and £7332.57 from Lion Heating Ltd. He has produced payslips from Lion Heating for the period December 2016 to May 2016 showing net payments of £533.27 which are also reflected in her bank statements for

the same period. He has also produced payslips for Poundland for the same period showing net payments of between £798.26 and £949.04 also showing in her bank statements for the same period.

14. The Appellant also produced a letter from Lion Heating and an employment contract with Poundland neither of which complies with the specified evidence requirements for the employer's letter set out above. Although the Appellant has failed to produce letters complying with the exact requirements of Appendix FM-SE there can, in my judgement, be no doubt that the Appellant's wife earns in excess of the income requirement of £18,600 set by the Immigration Rules. Her P60s taken together with six months of payslips and bank statements are sufficient evidence of this. In **R (on the application of MM (Lebanon)) (Appellant) v Secretary of State for the Home Department** [2017] UKSC 10 the Supreme Court made the following comments at paragraphs 76 and 77 in relation to the weight to be accorded to the Secretary of State's policies and expertise as expressed in the Rules:

"75. As Lord Reed has shown (Hesham Ali, paras 46f), although the tribunal must make its own judgment, it should attach considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy. He cites Lord Bingham's reference in Huang to the need to accord appropriate weight to the judgment of a person "with responsibility for a given subject matter and access to special sources of knowledge and advice". As that passage indicates, there are two aspects, logically distinct: first, the constitutional responsibility of the Secretary of State for setting national policy in this area; and secondly the expertise available to her and her department in setting and implementing that policy. Both are relevant in the present case, but the degree of respect which should be accorded to them may be different. The weight to be given to the rules or Departmental guidance will depend on the extent to which matters of policy or implementation have been informed by the special expertise available to the Department. A good illustration in a different factual context is to be found in the Denbigh High School case, above, on which Lord Wilson in Quila (para 46ff) placed particular reliance as explaining "the nature of the court's inquiry" under the "fair balance" part of the four-stage test. Lord Bingham (para 30) referred to the "value judgment" required, in which proportionality was to be judged "objectively, by the court ..." It is notable however that the "objective" inquiry actually undertaken by Lord Bingham in that case (concerning school uniform policy as applied to Muslim girls) involved giving substantial weight to the judgment of the school:

"It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision."

By contrast in Quila itself, as Lord Wilson held (para 58), the Secretary of State had failed to show any adequate evidentiary support for the policy choices reflected in the rules under challenge.

76. As Lord Reed explains (Agyarko, para 47), this approach is consistent with the margin of appreciation permitted by the Strasbourg court on an "intensely political" issue, such as immigration control. However, this important principle should not be taken too far. Not everything in the rules need be treated as high policy or peculiarly within the province of the Secretary of State, nor as necessarily entitled to the same weight. The tribunal is entitled to see

a difference in principle between the underlying public interest considerations, as set by the Secretary of State with the approval of Parliament, and the working out of that policy through the detailed machinery of the rules and its application to individual cases. The former naturally include issues such as the seriousness of levels of offending sufficient to require deportation in the public interest (**Hesham Ali**, para 46). Similar considerations would apply to rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee. By contrast rules as to the quality of evidence necessary to satisfy that test in a particular case are, as the committee acknowledged, matters of practicality rather than principle; and as such matters on which the tribunal may more readily draw on its own experience and expertise."

15. I accept, having considered the evidence before me, that the Appellant meets the substantive financial requirements of the Rules and has demonstrated that his wife's income exceeds £18,600. This has a significant impact on the weight to be accorded to the public interest in immigration control. However, section 117 B of the 2002 Act must also be considered. Sections 117A and 117B are found in part 5A of the 2002 Act and apply in all cases where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's rights under Article 8.

Section 117A is as follows:

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
  - (a) breaches a person's right to respect for private and family life under Article 8, and
  - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
  - (a) in all cases, to the considerations listed in section 117B, and
  - (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
- (3) In subsection (2), "*the public interest question*" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

16. The considerations referred to in section 117A(2)(a), which are said by that provision to be applicable in all cases where the public interest question is under consideration, are as follows:

- (1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

17. The Appellant speaks English having satisfied the requirements of Appendix O. He can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of fluency in English, or the strength of their financial resources as these are neutral factors (**Rhuppiah** [2016] EWCA Civ 803). In **Rhuppiah** the Court of Appeal held at paragraph 63 that the expression 'financially independent' should be given its natural meaning of as indicating someone who is financially independent of others. The Appellant is dependent on his wife and for the purposes of s117B is not financially independent although it cannot be said that he will be a burden on the state as he meets the financial requirements of the immigration rules. He formed his relationship with a qualifying partner when he was here lawfully as, on my findings, he has remained in the UK lawfully since October 2009. As concluded by Lord Reed in **Hesham Ali v Secretary of State** [2016] UKSC 60, para 42, and **R (on the application of Agyarko) v SSHD** [2017] UKSC 11, para 42, the ultimate issue is whether a fair balance has been struck between individual and public interests, taking account the various factors identified. In the circumstances of this case, where the Appellant meets the requirements of the Rules and there are no public interest considerations that weigh against him in the balancing exercise, I find that his removal would be disproportionate.

**Notice of Decision**

Having set aside the decision of the First-tier Tribunal I re-make the decision in the appeal by allowing it under Article 8.

No anonymity direction is made.

Signed

Dated 14 July 2017

Deputy Upper Tribunal Judge L J Murray