Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number HU/18629/2018

THE IMMIGRATION ACTS

Heard at Field House
On 20th May 2019

Decision and Reasons Promulgated
On 7th June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

MAHBUBUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr U Ezeoke (Counsel, instructed by Pillai & Jones, Solicitors)
For the Respondent: Mr D Clarke (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. In this decision the term Appellant refers to Mr A Islam who was the Appellant before the First-tier Tribunal and the term Respondent will refer to the Secretary of State. This is to preserve uniformity in the terminology used and to avoid confusion although this is an appeal by the Secretary of State against the decision of the First-tier Tribunal.

2. The Appellant's application for leave to remain (LTR) made on the basis of his family life with his partner was refused by the Secretary of State for the reasons given in the Refusal Letter of the 21st of August 2018. The Appellant's appeal was heard by First-tier Tribunal Judge Jones at Taylor House on the 14th of February 2014 and allowed for the reasons given the decision promulgated on the 4th of March 2019.

3. The findings are set out in paragraphs 36 to 51 of the decision. The Judge accepted that the Appellant and Sponsor were in a genuine and subsisting relationship but did not accept that the Appellant could rely on paragraphs EX.1/2. The evidence relating to the relevant period pre-application was such that the Appellant did not meet the terms of Appendix FM-SE regarding earnings but that there were savings of £20,000 for the year to June 2018. The Appellant did not meet the English language requirement but the Judge took the view that the Appellant's position overlooked paragraph 276ADE(1)(vi) and his ability to return to Bangladesh.

4. The issue of whether there were exceptional circumstances was considered from paragraph 41 onwards. The Appellant's relationship was accepted as was his ability to speak English. The Judge noted the Appellant's poor immigration history and that little weight attached to the relationship established in the circumstances noted. The Appellant's wife's objections to moving to Bangladesh was that for health condition she would be starting with new team of clinicians, not that treatment was not available, she had not given evidence that she would not go (paragraph 45).

5. Having referred to Chikwamba and Chen the Judge found that the Sponsor's dip in earnings was explained by her taking a new job and temporary hours and that there were significant savings. It was unfortunate that the Appellant had not taken an English language test but as the Appellant spoke fluently in giving evidence an application for entry clearance, in the view of the Judge, "might well be granted." As the Appellant's wife's health could be exacerbated by the stress of his removal the Judge found that the balance fell in the Appellant's favour.

6. The submissions are set out in the Record of Proceedings and both representatives made submissions in line with their respective positions. With regard to finance Mr Ezeoke referred to the Sponsor's current account which showed a balance of over £9,000 over the same period. Mr Clarke accepted he had overlooked that but observed that the Appellant still did not meet the rules in the absence of an English language test.

7. In the course of the Appellant's submissions I asked what obstacles there were to family life being pursued abroad. Mr Ezeoke referred to the Sponsor's medical condition, the evidence that to have a child they would have to stay in the UK and that treatment would have to start again and that to start again would be disproportionate

8. At the end of the hearing I reserved the decision both on the issue of whether there was an error and also as to the disposal of the appeal with the options being that either I remade the decision or remitted the appeal to the First-tier Tribunal. Mr Clarke had submitted that if I found an error I could remake the decision, for the Appellant remittal was urged in those circumstances.

9. As it was accepted that the Appellant did not meet the Immigration Rules at the time of the application, both with regard to finance and there being no English language test, compelling circumstances were required to justify a grant of leave outside the rules. As the Judge had noted the relationship had been commenced when the Appellant's status was precarious and accordingly attracted little weight. The Appellant could not rely on EX.1, not only could the Appellant be expected to return to Bangladesh but from the findings made and with the Sponsor not having given evidence that she would remain in the UK there would be no basis for finding that family could not reasonably be pursued in Bangladesh.

10. On the Appellant's side there was the finding that the relationship was genuine and subsisting and the Appellant had been supported by the Sponsor. Her health was an issue but the objection to her going to Bangladesh was that she would be starting afresh with a new set of clinicians, not that treatment could not be obtained there. While there was the preference of the UK doctors

that if she were to get pregnant it would be better if treatment took place in the UK there was no evidence to show that in such circumstances she would be unable to receive suitable treatment in Bangladesh. This aspect had to be seen in the context of the circumstances in which the relationship started and the reduced weight that it attracted.

11. Article 8 is not a by-pass to the Immigration Rules or a stand-alone provision. As indicated above the fact that the Appellant could not meet the Immigration Rules was a weighty factor that counted against him. The fact that the Appellant cannot meet the English test requirement is not obviated by the Judge's own assessment of the Appellant's skills, in doing so the Judge failed to give the Immigration Rules the weight that they deserved.

12. The Appellant's immigration was an additional factor that counted against him. In terms of the view of the ECtHR on what constitutes exceptional factors guidance is given in the case of Jeunesse [2014] ECHR 1309. In that case the Appellant had lived in the Netherlands for 17 years making applications with no effort by the state to remove her, that fact combined with her having been, at one stage, a Dutch national were exceptional circumstances justifying a grant of leave under article 8. Had it not been for those 2 factors the view of the ECtHR was that it would have been reasonable to expect the family, if they wished to remain together as a unit, to relocate to Indonesia where she remained a citizen.

13. The Appellant's time in the UK was illegal following his failure to leave the UK at the end of his working holiday visa and he had only started to make applications to remain in 2017, at no stage could the Appellant point to the factors that weighed heavily in the case of Jeunesse. In effect against the background of the Appellant's lengthy overstaying there was a short period in which the Appellant had made 2 applications, the second given rise to these proceedings. In my view there was no basis for the Judge relying on 2 applications, made in fairly short order, as factors weighing positively in the balancing exercise. The applications had to be seen in the context of the lengthy illegal and earlier precarious presence and those circumstances remained to be held against the Appellant as the Judge had earlier noted.

14. When the application was made the financial information relied on did not meet the Immigration Rules. That the Sponsor's current account post-application provides sufficient funds with the savings account to make up the shortfall does not take the matter much further as the Appellant does not meet the rules for other reasons. In essence the matters taken by the Judge to be compelling had been discounted as having any effect under the rules, in those circumstances it was contradictory and without foundation to give them any weight in the balancing exercise.

15. For the reasons given I find that the Judge made an error of law in the approach taken to the underlying facts and, having accepted that the Appellant could not meet the Immigration Rules, finding that there were compelling circumstances that would make removal disproportionate. As noted above the Judge had effectively, if not explicitly, found that family life could reasonably be enjoyed in Bangladesh. The only factor that might have counted against such a finding was the Sponsor's medical condition and her objection was starting again with a new team. Given that her condition was known when the relationship started it had to be seen in that context. As the Sponsor could reasonably be expected to join the Appellant in Bangladesh the consequences of a decision to remain in UK were not relevant.

16. In my view in the absence of compelling factors and on the basis that family life could reasonably be enjoyed in Bangladesh if the couple would prefer to live in the UK the appropriate way forward is for the Appellant to do what he should have done years ago and return to Bangladesh and to apply in the usual way as most people in his situation actually do.

The prospects of such an application are not a matter that come into consideration although I observe that if the Appellant leaves voluntarily, takes and passes the appropriate English test and evidence to meet the provisions of Appendix FM and FM-SE is submitted he will be in a considerably stronger position than before.

17. On the basis of the foregoing I set aside the decision of Judge Jones. On the evidence that is available I am satisfied that I have sufficient information to remake the decision and that remittal is unnecessary. I remake the decision dismissing the appeal of the Appellant for the reasons given above.

CONCLUSIONS

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

I set aside the decision. I remake the decision and dismiss the substantive appeal of Mahbabul Islam

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing this appeal I make no fee award.

Signed: 

Deputy Judge of the Upper Tribunal (IAC)

Dated: 30th May 2019