



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/23274/2015

THE IMMIGRATION ACTS

Heard at Field House
On 6th December 2018

Decision & Reasons Promulgated
On 18th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS FAHMIDA [R]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms. S Vidyadharan, Home Office Presenting Officer

For the Respondent: Mr. M Hasan, Counsel instructed by Kalam Solicitors

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department and the respondent to this appeal is Mrs Fahmida [R]. However for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal ("FTT"). I shall in this decision, refer to Mrs [R] as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Bangladesh. She was granted leave to enter the UK as a visitor from 21st May 2006 to 21st November 2006. She arrived in the UK on 12th June 2006 and remained in the UK unlawfully, when her leave to enter expired. On 12th June 2014, the appellant married Mr. [AH], a British Citizen. Thereafter, on 1st April 2015, the appellant made an application for leave to remain in the UK as the spouse of a person present and settled in the UK. The application was refused by the respondent for the reasons set out in a decision dated 10th June 2015.
3. The decision of 10th June 2015 gave rise to an appeal that was heard by FfT Judge Abebrese on 18th August 2016. For the reasons set out in a decision promulgated on 15th September 2016, the FfT Judge allowed the appeal on human rights grounds. It is that decision that that is the subject of the appeal before me. Permission to appeal was granted by Upper Tribunal Judge Jackson on 26th October 2018. In doing so, she noted that it is arguable that the FfT Judge erred in his approach to the issues under paragraph 276ADE and Appendix FM of the Immigration Rules, and that insufficient reasons have been given for the apparent conclusions that the requirements are met.
4. Mr Hasan, rightly in my judgement, accepts that the Judge erred in his approach to paragraph EX.1 of Appendix FM of the Immigration Rules, and the public interest considerations under s117B Nationality, Immigration and Asylum Act 2002. He submits that the error is immaterial because on any proper consideration of the evidence, the outcome of the appeal would be the same.
5. At the conclusion of the hearing before me, I informed the parties that in my judgement, the decision of the FfT Judge does contain a material error of law, and that I set aside that decision. The assessment of an Article 8 claim such as this is always a highly fact sensitive task. The Judge placed significant weight upon the fact that the appellant is married to a British Citizen and that since the respondent's decision, the appellant has given birth to a child who is a British Citizen. The Judge appears to have treated those factors as determinative of the appeal without adequately addressing the test under paragraph EX.1. Having carefully considered the decision of the FfT Judge, I cannot be satisfied that the Judge would have reached

the same decision had be properly and adequately addressed the relevant provisions of the Immigration Rules and the public interest considerations under s117B.

6. Directions were issued to the parties in advance of the hearing before me requiring the parties to prepare for the hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision, can be so considered at that hearing.
7. In preparation for the hearing of the appeal before me, the appellant's representatives filed a bundle comprising of 53 pages, including a witness statement made by the appellant (*dated 8th August 2016*) and a statement made by her partner, Mr [AH] (*dated 8th August 2016*). Both of those witness statement were before the FtT Judge previously. Although there was no application made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I was provided with a copy of the birth certificate of the appellant's youngest child ("MZH") who was born on 3rd October 2018.
8. The only ground of appeal available to the appellant is that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. As to the Article 8 claim, the burden of proof is upon the appellant to show, on the balance of probabilities, that she has established a family life with her husband and children, and that her exclusion from the UK as a result of the respondent's decision, would interfere with that right. It is then for the respondent to justify any interference caused. The respondent's decision must be in accordance with the law and must be a proportionate response in all the circumstances. If Article 8 is engaged, the Tribunal may need to look at the extent to which an appellant is said to have failed to meet the requirements of the rules, because that may inform the proportionality balancing exercise that must follow.

The respondent's decision

9. In the decision of 10th June 2015, the respondent concluded that the appellant is unable to satisfy the requirements of Appendix FM and paragraph 276ADE(1)(vi) of

the immigration rules. The respondent considered the appellant's application by reference to the requirements for leave to remain as a partner under Appendix FM R-LTRP. As the appellant could not meet all of the requirements of Section E-LTRP, the respondent considered the application by reference to the requirements of Section E-LTRP.1.1(a), (b) and (d). The respondent was not satisfied that the requirements of paragraph EX.1 are met by the appellant. The respondent acknowledged that the appellant's partner has lived all his life in the UK but noted that that is not to say that the appellant and her partner are unable to live together in Bangladesh. The respondent stated that although living in Bangladesh together may cause a degree of hardship for the appellant's partner, there is no evidence that there are insurmountable obstacles preventing the appellant and her partner from continuing their relationship in Bangladesh. The respondent went on to consider whether there are any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 might warrant the grant of leave to remain outside of the requirements of the immigration rules. The respondent noted that the appellant was pregnant, but concluded that that was not a barrier to the appellant returning to Bangladesh.

The evidence before me

10. The appellant's evidence is set out in her witness statement dated 8th August 2016, that is signed with a statement of truth. It comprises of five paragraphs. The appellant confirms that she entered the UK as a visitor on 12th June 2006. She offers no explanation whatsoever for her failure to leave the United Kingdom when her visit visa expired, and fails to provide any evidence of the background to her relationship with Mr. [AH] beyond stating that they married on 12th June 2014 and that they have been "... maintaining a happy married life since we got married.". The appellant confirms that her marriage is subsisting and that there is a child of that relationship ("MRH") who was born on 6th October 2015. She confirms that her son is a British Citizen. The appellant refers to the refusal of her application for leave to remain and simply states "... I have provided evidence that I am a pregnant woman (sic) with an expected date of delivery of 4th October 2015 ...". The appellant invites the

Tribunal to allow the appeal, and allow her leave to remain in the UK “... for the sake of family unity to maintain family life and for our newly born baby ...”.

11. Although there was no application to call any supplementary oral evidence, I note from the decision of the FtT Judge that the appellant was cross-examined. At paragraph [17] of his decision, the FtT Judge records the evidence given by the appellant in cross-examination as follows:

“... the sponsor was married through an arranged marriage. She gave evidence that she allowed her leave in this country to expire in 2006 because she has family in this country and therefore decided not to return to Bangladesh. She then went on to give evidence that however she does have family in Bangladesh which consist of one brother, father and stepmother. She was being supported by her brother. She does not think that it is practical for her to return to Bangladesh by leaving a 10 month old baby behind in this country because he will not be able to go with her so therefore it would be very difficult. Furthermore, she gave evidence that she would not be supported by members of her family in Bangladesh because they did not have the resources or the capacity to do so. It would also not be possible for her husband to bear the expenses if she were to return to Bangladesh. There was no re-examination of the appellant.”

12. I also have a statement made by Mr [AH] dated 8th August 2016, that is signed with a statement of truth. The statement is in almost identical terms to the statement made by the appellant. Mr [H] confirms that he is a British Citizen by birth and the husband of the appellant. Mr [H] also states that they married on 12th June 2014, and that they have been “... maintaining a happy married life since we got married.”. Mr [H] also confirms that the marriage is subsisting and that there is a child of that relationship (“MRH”) who was born on 6th October 2015 and is a British Citizen. The appellant’s husband refers to the refusal of the appellant’s application for leave to remain and confirms that the appellant has provided evidence that she is pregnant with an expected date of delivery of 4th October 2015. The appellant’s husband states “... we are currently facing mental turmoil due to the uncertainty of my wife’s immigration status. We have been suffering anxiety because of this present situation ...”. He too invites the Tribunal to allow the appeal and allow the appellant leave to remain in the UK “... for the sake of family unity to maintain family life and for our newly born baby ...”.

13. I note from the decision of the FtT Judge that the appellant's husband was also cross-examined. At paragraph [19] of his decision, the FtT Judge records the evidence given by the appellant's husband in cross-examination as follows:

"... he gave evidence that was consistent with that of his wife in relation to when they met and the fact that their marriage was an arranged marriage. He found out after he married the appellant that his wife did not have leave to remain in this country. He also confirmed that his wife does have a family in Bangladesh consisting of a father, brother and a stepmother. His wife arrived in this country as a child and has resided here for a long period of time. Since then she has become a part of his family and that it has been a long time since she went back to Bangladesh."

14. The appellant's bundle comprising of 53 pages has within it, a contract of employment that shows that Mr [AH] is employed by Mitie Security Limited. His employment as a Security Officer is said to have commenced on 2nd December 2013. The contract of employment states that he is paid a basic hourly rate of £9.00 for work undertaken at a particular site, and that his hours of work are variable. There is also within the appellant's bundle, a number of payslips that show a variable income for the six months between February 2016 and July 2016. The bundle also includes bank statements that demonstrate payment of the income from that employment into a bank account in the name of the appellant's partner, for January 2016, February 2016, June 2016 and April 2016. There is no explanation for the failure to provide bank corresponding to the same period as the payslips or the other evidence that is required to evidence earned income as set out in Appendix FM-SE of the rules.
15. On behalf of the appellant, Mr Hasan submits that the appellant can meet the requirements of the immigration rules, if an application for entry clearance were to be made by the appellant. Relying upon paragraph [51] of the judgement of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11, he submits that although the appellant has been residing in the UK unlawfully, the public interest does not require the removal of the appellant from the UK, so that an application for entry clearance can be made by her.

Findings and Conclusions

16. The limited evidence before me is uncontroversial. The respondent appears to have accepted, and in any event I find, that the appellant is married to Mr [AH], who is a British citizen. I am satisfied that the relationship between the appellant and Mr [H] is genuine and subsisting. I find that there are two children of that marriage, RH, born on 6th October 2015 (*now aged 3*) and MZH, born on 3rd October 2018 (*now 3 months old*). I accept that both children are British Citizens. Beyond the fact that the appellant and her husband live together with their children as a family unit, there is no evidence at all before me about the family's circumstances. Mr Hasan submits, and I accept, that the appellant's husband and the two children are in good health.
17. The appellant has remained in the United Kingdom unlawfully since her leave to enter as a visitor expired in November 2006. She could not therefore satisfy the immigration status requirements set out in appendix FM of the immigration rules. The question for me is therefore whether paragraph EX.1 of the Immigration Rules applies. It is useful to set out the relevant provision;

'EX.1. This paragraph applies if

- (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
 - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
 - (bb) is in the UK;
 - (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
- (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or
- (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their

partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.'

18. Here, I must consider paragraphs EX.1(a) and (b). It is useful however to begin by considering whether paragraph EX.1(b) applies, first.
19. Although I have found that the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, there is nothing in the evidence before me that begins to suggest that there are insurmountable obstacles to family life with that partner continuing outside the UK. There is no evidence whatsoever, before me, that could even begin to establish that very significant difficulties would be faced by the appellant or her partner in continuing their family life together outside the UK, and which could not be overcome or would entail very serious hardship for the appellant or her partner.
20. On the evidence before me, I find that appellant is unable to establish that there are insurmountable obstacles to family life between the appellant and her partner continuing outside the UK. Where the appellant and her partner are expected to be, is plainly relevant since it will normally be reasonable for the children to be with them.
21. I accept on the evidence before me that the appellant has a genuine and subsisting parental relationship with her two sons, both of whom are under the age of 18, are in the UK, and are British Citizens. The question for me is whether, taking into account their best interests as a primary consideration, it would be reasonable to expect the children to leave the UK.
22. It is to be noted that the question of whether it is "reasonable" to expect a child to leave the UK as set out in paragraph EX.1 of the rules, arises in other places too. A similar "reasonableness" test is referred to in paragraph 276ADE(1)(iv) of the rules and the "reasonableness" test appears identical to that of section 117B(6), taken with the definition of "qualifying child". In KO (Nigeria) and Others -v- SSHD [2018] UKSC 53, Lord Carnwath, with whom Lord Kerr, Lord Wilson, Lord Reed and Lord

Briggs agreed, referred to paragraphs 276ADE(1)(iv) of the Immigration Rules, and s117B(6) of the 2002 Act.

23. At paragraphs [17] to [19], Lord Carnwath stated:

"17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).

18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245:

"22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made ..."

19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) -v- Secretary of State for the Home Department* [2014] EWCA Civ 874, para 58:

"58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves."

24. Here, the appellant's husband is a British Citizen as are the appellant's two sons. The eldest child is 3 years old and the youngest is 3 months old. It is unfortunate that the appellant and her representatives have failed to put before the Tribunal any evidence that goes beyond the existence of a family unit. I have no evidence before me regarding the circumstances of the family, any wider family support available to them, their health, their plans for the future, evidence as to the best interests of the children and crucially, addressing the question as to whether it would be reasonable to expect the children to leave the UK.
25. I find that the appellant, her husband and their children have lived together as a family unit. The children have been brought up, by their parents since they were born and it is very much in the children's best interests that this continues. The children are not however in education and there is no evidence before me that they have any particular needs that could not be met, if they were to leave the UK. Beyond the fact that they are British Citizens, there is no evidence before me of any particular factors to support a claim that it would not be reasonable to expect the children to leave the UK.
26. The children are in no way to be held responsible for the poor immigration history of the appellant, but as has been said repeatedly, the children are not a "trump card". As Lord Carnwath states in KO (Nigeria) and Others, a "real world" view must be taken. The appellant's husband and the children are British Citizens and there can be no question of them being required to leave the UK, with the appellant. In the real world, families move countries and continents all the time, for any number of reasons, and frequently so that the parents can find, or continue with work. There is no evidence before me to suggest that the appellant's partner would be unable to cope alone with the children, with the support of his family, if they chose to remain in the UK. In my judgement, whether the appellant's husband and children remain in the UK whilst the appellant makes an application for entry clearance, or choose to

live with the appellant in Bangladesh temporarily whilst an application for entry clearance is made or for some longer period, will in the end, be a matter of choice. There is nothing in the evidence before me that suggests that if they chose to live with the appellant in Bangladesh for a period whilst steps were taken to secure entry clearance, the children would suffer some adverse consequence. To the contrary, it seems that the children would have an opportunity to meet and live with their maternal family. They are young enough to adapt. There is quite simply nothing in the evidence before me that could properly lead me to conclude that taking into account their best interests as a primary consideration, it would not be reasonable to expect the children to leave the UK.

27. As Lord Carnwath stated, at paragraph [18] in KO (Nigeria), the record of the parents may become indirectly material. My conclusion that there are no insurmountable obstacles to family life between the appellant and her husband continuing outside the UK, is again relevant because taking a holistic view of the circumstances, it is in that context that I should consider whether it is reasonable for the children to live in the UK with their father, or live with the appellant and her husband as a family unit. I understand that the appellant claims that the best interests of the children would be for the whole family to remain here. However, in the context where there are no insurmountable obstacles to family life between the appellant and her husband continuing outside the UK, the natural expectation would be that the children, aged 3, and 3 months, would go with them, and there is nothing in the evidence to suggest that that would be other than reasonable.
28. I find therefore that the appellant is unable to meet the requirements of Appendix FM and paragraph 276ADE of the Immigration Rules.
29. As to the human rights claim on Article 8 grounds, I adopt the approach set out by Lord Bingham in Razgar [2014] UKHL 27. I must first determine whether Article 8 of the ECHR is engaged at all. If Article 8 is engaged, I should go on to consider the remaining four stages identified in Razgar.

30. I have already found that the appellant is in a genuine and subsisting relationship with her husband and children. Article 8 is plainly engaged. I also find that the decision to refuse the appellant leave to enter may have consequences of such gravity as potentially to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the economic well-being of the country.
31. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved. The appellant's ability to satisfy the immigration rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. I have already found for the reasons set out that the appellant cannot satisfy the requirements of the immigration rules.
32. I remind myself that section 117A Nationality, Immigration and Asylum Act 2002 requires that in considering the public interest question, I must (in particular) have regard to the considerations listed in section 117B. I acknowledge that the maintenance of effective immigration controls is in the public interest. I acknowledge that s117B(6) of the 2002 Act provides that in the case of a person who is not subject to deportation, the public interest does not require the person's removal where the person has a genuine and subsisting parenting relationship with a qualifying child, and it would not be reasonable to expect the child to leave the United Kingdom. For the purposes of s117B(6) a qualifying child means a child under the age of 18 who, *inter alia*, is a British citizen. For the reasons I have already set out when considering whether paragraph EX.1.(a) of Appendix FM applies, I am unable to conclude on the evidence before me, that it would be unreasonable to expect the children to leave the United Kingdom.
33. On behalf of the appellant Mr. Hasan submits that the public interest does not require the removal of the appellant because any application for entry clearance made by the appellant, would succeed. He submits that any disruption caused to the family's Article 8 rights, would in the circumstances, be entirely disproportionate to

the legitimate aim of immigration control. I accept as Mr Hasan submits, that the decision of the House of Lords in Chikwamba v SSHD [2008] UKHL 40 and subsequent decisions of the Court of Appeal and Tribunal establish that where there is evidence that an application for entry clearance from abroad is likely to succeed, then the weight to be accorded to the requirements of obtaining entry clearance from abroad is reduced, particularly in cases involving children. However, in my judgement, an argument founded on Chikwamba cannot succeed on the evidence before me. In Chikwamba, the House of Lords had found that there would be a violation of Article 8 if the applicant were removed from the UK and forced to make an out-of-country application for leave to enter which would clearly be successful, in circumstances where the interference with her family life could not be said to serve any good purpose. Here there is insufficient evidence before me to conclude that an out-of-country application would clearly be successful because all of the relevant requirements for leave to enter under Appendix FM and Appendix FM-SE can be satisfied. The respondent did not concede that all of the requirements of Appendix FM were met by the appellant, and there is simply a void in the evidence before me. Although it is claimed by the appellant's husband that the minimum income requirement is met, the evidence required to establish that that is so, is not before the Tribunal.

34. In my judgment having taken all the evidence into account, the refusal of leave to remain is proportionate to the legitimate aim of enforcing immigration control. It follows that the appeal is dismissed.

Notice of Decision

35. The appeal by the SSHD against the decision of FfT Judge Abebrese is allowed, and the decision of FfT Judge Abebrese is set aside.
36. I remake the decision and dismiss the appeal on Article 8 grounds.

Signed

Date 28th January 2019

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

I have dismissed the appeal and there can be no fee award

Signed

Date 28th January 2019

Deputy Upper Tribunal Judge Mandalia