



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: HU/04492/2020**

**THE IMMIGRATION ACTS**

**Heard at Manchester CJC (via Microsoft Decision & Reasons  
Teams) Promulgated  
On the 9 February 2022 On the 29 March 2022**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**MD MAHMUDUL HASAN**  
(Anonymity direction not made)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms Nnamani, a Direct Access Barrister  
For the Respondent: Mr Tan, a Senior Home Office Presenting Officer.

**DECISION AND REASONS**

**Background**

1. By a decision promulgated on 28 October 2021 the Upper Tribunal set aside the decision of the First-tier Tribunal and listed this appeal for a substantive rehearing before the Upper Tribunal, following which this decision has been reached.
2. The appellant is a citizen of Bangladesh born on 15 February 1986. On 29 August 2019 he made a human rights claim in an application for indefinite leave to remain in the United Kingdom on the basis of 10

years long residence and his private life, which was refused by the Secretary of State on 5 March 2020. It is the appeal against that decision which comes before this court.

3. A number of preserved findings were made following the finding the Judge below had erred in law in the following terms (reference to paragraph numbers are as they appear in the First-tier Tribunal determination):
  - ii. The Judge's findings that the appellant and sponsor are in a relationship which is genuine and subsisting [36], that it was not accepted the appellant's life is at risk in Bangladesh due to any dispute [40], that even if a dispute was an issue it is likely the appellant could relocate in Bangladesh [41], that the language and culture in Bangladesh would not be entirely alien to the sponsor given her parents background and that of her extended family from Bangladesh who also live in the United Kingdom [43], that it is unlikely the sponsor will be able to obtain comparable employment that she has in the UK in Bangladesh, that she will face difficulties obtaining employment, but that it is likely she would obtain some form of employment in Bangladesh, but of a much lesser nature [46], that there is no reason why the appellant cannot work in Bangladesh and that it is likely he would be able to support his wife as she has done for him in the UK [47], that it is not likely the appellant will be destitute as he claims he will be in his witness statements and that is likely that he has family support in Bangladesh [47], that it was not considered there are very significant obstacles to the appellant's integration into Bangladesh pursuant to paragraph 276ADE [51], shall be preserved findings.
4. In addition to the documentary evidence the appellant and his partner attended for the purposes of cross-examination and re-examination.

## **Discussion**

5. The first issue raised by Ms Nnamani on behalf of the appellant in her submissions was what she describes as a 'Chikwamba point' in requiring the appellant to return to Bangladesh to make an application to return to the UK lawfully to remain with his partner.
6. I note the appellant has a long immigration history and would like to remain in the United Kingdom with his partner, but I was not referred to any aspect of the law, particularly article 8 ECHR, which enables a person to choose where they wish to live.
7. In relation to the appellant's immigration history, this is set out in the First-tier determination in the following terms:
  4. The appellant entered the UK on 25 May 2009 when a student visa valid until 30 September 2011. On 5 June 2016 he submitted and in time application for leave to remain outside the immigration rules. This was initially refused with an out of country right of appeal on 1 November 2016. The decision was served again on 23 November 2016 as the original notification was not received.
  5. The appellant submitted a further application for leave to remain outside of the rules on 6 December 2016. Before a decision was served the appellant varied his application to leave to remain under family/private life on 6 July 2017. However, his original application for leave to remain outside the rules was refused with no right of appeal on 24 July 2017.
  6. On 21 August 2017 a PAP was received, and the outcome was reconsidered on 23 August 2017. On 30 August 2017 the PAP was concluded and the decision to refuse the appellant's initial application was reconsidered and his variation was accepted.

7. On 23 November 2017 the appellant varied his previous application to indefinitely remain under 10 years long residence however his previous varied application was then rejected on 30 November 2017. He submitted a PAP on 14 February 2018 and the PAP was concluded on 17 February 2018 as the rejection being reconsidered and the variation being allowed.
  8. On 13 March 2018 a judicial review (JR) was received. The JR was conceded on 19 June 2018 and on 24 July 2018 the appellant varied his previous application to leave to remain under 10 years long residency.
  9. On 30 October 2018 a PAP was received which was concluded on 12 November 2018. On 21 November 2018 a JR was received. On 14 December 2018 the appellant varied his application to indefinite leave to remain outside the immigration rules.
  10. On 10 April 2019 JR permission was refused. On 9 May 2019 the appellant varied this application to indefinite leave to remain under 10 years long residency.
  11. On 29 August 2019 the appellant submitted the current application.
- 8.** In the reasons for refusal the Secretary of State rejected the entitlement to indefinite leave to remain on the grounds of 10 years continuous lawful residence on the basis the appellant had only lived in the UK lawfully between 24 May 2009 and 23 November 2016 when his in-time application for leave to remain outside the immigration rules was refused. No further lawful leave had been granted to the appellant since. It was not found the appellant could satisfy the requirements of paragraph 276B(i)(a); a position which was accepted by the appellant's representatives before the First-tier Tribunal as noted at [22] of the First-tier Tribunal decision.
- 9.** Any suggestion that the appellant's period of leave was lawful by reference to paragraph 39E of the rules is without merit. That provision of the rules reads:
- 39E. This paragraph applies where:
- (1) the application was made within 14 days of the applicant's leave expiring and the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in-time; or
  - (2) the application was made:
    - (a) following the refusal of a previous application for leave which was made in-time; and
    - (b) within 14 days of:
      - (i) the refusal of the previous application for leave; or
      - (ii) the expiry of any leave extended by section 3C of the Immigration Act 1971; or
      - (iii) the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable); or
      - (iv) any administrative review or appeal being concluded, withdrawn, abandoned or lapsing; or
  - (3) the period of overstaying was between 24 January and 31 August 2020; or
  - (4) where the applicant has, or had, permission on the Hong Kong BN(O) route, and the period of overstaying was between 1 July 2020 and 31 January 2021.

- 10.** It was not established before me, reference to any relevant case law, that this rule retrospectively confers leave that has already expired upon an applicant. The purpose of the rule is to prevent an overstay from having their application refused solely by reason of the fact they have overstayed.
- 11.** The application that had been subsequently made, as noted in the chronology, after the appellant's lawful leave expired and the submission that he had been lawfully in the UK since 2009 is not made out.
- 12.** The appellant claims that if he was returned to Bangladesh to make an application he can demonstrate that he can satisfy all of the requirements of the rules, making it disproportionate that he should be removed. Any such application for leave will be made under Appendix FM for entry clearance as a partner. That aspect of the rules requires:

**Immigration Rules Appendix FM: family members**

Family members

Section EC-P: Entry clearance as a partner

EC-P.1.1. The requirements to be met for entry clearance as a partner are that-

- (a) the applicant must be outside the UK;
- (b) the applicant must have made a valid application for entry clearance as a partner;
- (c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability-entry clearance; and
- (d) the applicant must meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner.

**13.** No issues were raised in relation to the suitability grounds and it is assumed that the appellant would have made a valid application from Bangladesh. The relationship aspect of the eligibility criteria is accepted making it necessary for the appellant to show that the minimum financial requirements can also be demonstrated.

**14.** Those require the applicant to demonstrate:

**Financial requirements**

E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-

- (a) a specified gross annual income of at least-
  - (i) £18,600;
  - (ii) an additional £3,800 for the first child; and
  - (iii) an additional £2,400 for each additional child; alone or in combination with
- (b) specified savings of-
  - (i) £16,000; and
  - (ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-ECP.3.2.(a)-(d) and the total amount required under paragraph E-ECP.3.1.(a); or

- 15.** In this appeal evidence has been provided, written and oral, to show that the appellant's partner works as a team leader in the customer contact centre for Lloyds Group plc.
- 16.** Evidence has been provided confirming her appointment on a full-time basis at a gross salary of £19,647, which is in excess of the £18,600 minimum sum required as the appellant and his partner have no children.
- 17.** Mr Tan was asked whether he accepted that the requirements Appendix FM had been met to which he responded to the effect that he could not make such a concession in light of the fact it was not established that the evidence that had been provided to support the income met the requirements of Appendix FM –SE.
- 18.** In *MM(Lebanon)* [2017] UKSC 10 it was said at [76] that the tribunal should attach considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy. However “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.”
- 19.** The appellant has provided a number of his partners payslips in his up-to-date bundle covering the period August 2020 to March 2021. The letter from the Lloyds group is dated September 2021 but what is missing is the requisite six months window of documents tying evidence of income in with evidence of genuine earnings, with evidence of monies being paid into a bank account. The appellant therefore failed to provide sufficient relevant evidence to show that he will be successful with any application on a hypothetical application made on return to Bangladesh.
- 20.** The requirement in the rules to provide the specified evidence to prove available resources was not provided at the hearing.
- 21.** In relation to the argument this is a *Chikwamba* issue; in *Chikwamba (FC) v SSHD* [2008] UKHL 40 the House of Lords considered the issue of queue jumping in the context of the need for an applicant to return to her country of origin (in this case Zimbabwe) to apply for entry to join her refugee spouse under the Rules. The Lords said that in deciding whether a general policy of requiring people such as

the Appellant to return to apply for entry in accordance with the rules of this country was legitimate and proportionate in a particular case, it was necessary to consider what the benefits of the policy were. Whilst acknowledging the deterrent effect of the policy the House of Lords queried the underlying basis of the policy in other respects and made it clear that the policy should not be applied in a rigid, Kafka-esque manner. The House of Lords went on to say that it would be “comparatively rarely, certainly in family cases involving children” that an Article 8 case should be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad.

**22.** In *Secretary of State for the Home Department v Hayat; Secretary of State for the Home Department v Treebhowan* (Mauritius) [2012] EWCA Civ 1054 the Court of Appeal outlined the following guidance as to the effect of *Chikwamba* and the subsequent decision of the Court of Appeal in *TG* (Central African Republic) [2008] EWCA Civ 997 and *SZ* (Zimbabwe) [2009] EWCA Civ 590 and *MA* (Pakistan) [2009] EWCA Civ 953 in which it had been considered:

- (i) Where an applicant who did not have lawful entry clearance pursued a claim under Article 8, a dismissal of the claim on the procedural ground that the policy required that the applicant should have made the application from his home state might, but not necessarily would, constitute a disruption of family or private life sufficient to engage Article 8, particularly where children were adversely affected;
- (ii) Where Article 8 was engaged, it would be a disproportionate interference with family or private life to enforce such a policy unless there was a sensible reason for doing so;
- (iii) Whether it was sensible to enforce that policy would necessarily be fact sensitive, and potentially relevant factors included the prospective length and degree of disruption of family life and whether other members of the family were settled in the UK;
- (iv) Where Article 8 was engaged and there was no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant had no lawful entry clearance;
- (v) Nothing in *Chikwamba* was intended to alter the way the courts should approach substantive Article 8 issues as laid down in seminal cases as *Razgar* and *Huang*;
- (vi) If the Secretary of State had no sensible reason for requiring the application to be made from the home state, the fact that he had failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise (para 30).

**23.** In *R (on the application of Chen) v SSHD* (Appendix FM –Chikwamba – temporary separation –proportionality) IJR [2015] UKUT 00189 (IAC) it was held that

- (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning *Chikwamba v SSHD* [2008] UKHL 40.
  - (ii) Lord Brown was not laying down a legal test when he suggested in *Chikwamba* that requiring a claimant to make an application for entry clearance would only “comparatively rarely” be proportionate in a case involving children (per Burnett J, as he then was, in *R (Kotecha and Das v SSHD* [2011] EWHC 2070 (Admin)). However, where a failure to comply in a particular capacity is the only issue so far as the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the rules.
- 24.** When the appellant’s partner was asked how long it would take for her husband having returned to Bangladesh to make an application for entry clearance to return to the UK supported by specified documents, it was clear that proper enquiry into this matter had not been made. The reply that it would take about a year is not supported by any evidence. It is accepted it may take 2 to 3 months from the date the application is made for it to be considered by an Entry Clearance Officer, and granted or refused, but it has not been shown that even if the parties were separated for that period that would make the respondent’s decision disproportionate.
- 25.** The concern about any period of separation focused on another issue as it was said by the appellant’s partner that his absence from the United Kingdom for any period of time may be detrimental to their attempts to have a child. Natural conception has not been successful, and the appellant and his partner have embarked on fertility treatment with the Liverpool Women’s Hospital. It is clear that a number of tests have been undertaken as a result of which an issue has arisen in relation to the appellant’s partners BMI. Letters provided show that review appointments have been arranged in the future to enable that to be assessed and to discuss the way forward with their medical team. What is not made out on the evidence is that any such treatment is at a critical stage where the appellant’s absence from the UK would be material. It was not made out that the requirements to move to the next stage of the fertility treatment will be met during the time the appellant might be away from the UK and there was no evidence of any enquiries having been made of the hospital to ascertain the significance of the more realistic timetable for his absence.

- 26.** Mr Tan provided before the hearing an Internet printout showing the availability of fertility treatment centres in Bangladesh. Although various criticisms were made of this evidence it is clear that facilities do exist in Bangladesh for the parties if they chose to return to live there together, where they can continue their family life and try to have a child. There was no evidence showing that the cost of any treatment in Bangladesh would make it disproportionate. It was not shown that as the key stage of any fertility treatment had not yet commenced in the UK it was unreasonable for them to start treatment in Bangladesh.
- 27.** The issue of the convenience of the centres for treatment in relation to where the appellant might live if returned to Bangladesh does not make their location or expectation of using such services unreasonable. Those wanting a child often go to great personal sacrifice to enable that to occur.
- 28.** A valid point made by Mr Tan is that the appointment letters also do not show the frequency of attendances for the appointments relating to the IVF. I also find merit in the submission that the claim the appellant will face exorbitantly high price hikes and bribery in Bangladesh is mere speculation not supported by any evidence.
- 29.** The preserved findings show there is family in Bangladesh and that no real risk to the appellant on return has been made out. It is also clear that the appellant and his partner could continue their current family life if they return to live in Bangladesh together. There is therefore a place outside the UK where family life can continue.
- 30.** In R (on the application of Agyarko) (Appellant) v Secretary of State for the Home Department (Respondent) R (on the application of Ikuga) (Appellant) v Secretary of State for the Home Department (Respondent) [2017] UKSC 11 an issue with the co-appellant was that of fertility treatment but despite that it was held that that appellant could not meet the insurmountable obstacles or compelling circumstances test.
- 31.** It is accepted that if the appellant has to return to Bangladesh with his partner there may be an impact upon his partners private life with her family in the UK but the evidence of the effect of the same is limited to a letter from her father who lives in a household with three other adult relatives. It was not made out that the impact of the decision on any third party is sufficient to render it disproportionate.
- 32.** Mr Tan also refer to section 117B of the Nationality, Immigration Asylum Act 2002 which reads:

**117B Article 8: public interest considerations applicable in all cases**

- (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.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
  - (b) it would not be reasonable to expect the child to leave the United Kingdom.
- 33.** The appellant speaks English and if sufficient evidence had been provided to show that at least the minimum level of income required by Appendix FM was genuinely available it may have been possible to find that he would not be a burden upon the public purse, especially if he himself was able to secure employment.
- 34.** I note in that respect the sick note that has been provided by the appellant confirming his partner's absence from work between 28 January and 14 February 2022 as a result of mixed anxiety and depressive disorder which, whilst understandable, is not determinative as there was no evidence of any ongoing treatment being required that would not be available in UK or Bangladesh or to show that the threshold set out in AM (Zimbabwe) is met.
- 35.** The appellant married his partner in an Islamic ceremony on 24 July 2019. It is known the appellant's lawful leave expired on 23 November 2016 and this is therefore a relationship formed during the time the appellant's status in the United Kingdom was unlawful. It has also, by definition, always been precarious for his period of lawful leave was not settled and was for a temporary purpose after which the appellant would have been expected to leave the United Kingdom. Both domestic statute and EU law entitle the UK to place little weight upon a relationship formed in such circumstances.
- 36.** The submission the appellant had not overstayed is wrong for the reasons set out above. It is not made out the appellant has been lawfully in the UK since 2009 and his later applications were clearly made after his leave to remain expired.
- 37.** As noted above, it has not been shown the appellant could meet the requirements of the Immigration Rules and although Ms Nnamani submitted on more than one occasion that it was not clear why the ability to meet the requirements of the rules was not considered by the First-tier Tribunal that judge did look at this issue. The reason it was not found the appellant could meet the requirements of the rules was considered at that earlier stage. The submission made on the appellant's behalf was that the appellant met the requirements of EX.1. (b) of the rules.

**38. EX .1 reads:**

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, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), 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.

- 39.** This provision is only applicable if a person is unable to satisfy certain eligibility requirements of Appendix FM which include those relating to financial resources. The appellant’s representative’s submission that this is the basis of which it is claimed they can succeed under Appendix FM must be an acceptance that the eligibility requirements cannot be met in full.
- 40.** The fact the appellant’s partner was born in the United Kingdom and has a job here and family does not amount to an insurmountable obstacle and is a factor that has been taken into account. She will not be expected to integrate on her own as she will have her husband with her together with available family.
- 41.** In Agyarko the Supreme Court remind us that the ultimate question in article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying a proportionality test.
- 42.** In this case it is accepted that family life between the appellant and his partner exists and that they have a private life in the United Kingdom. They are both, however, healthy young adults with no children.
- 43.** The Immigration Rules have been found to be compatible with article 8 and it is within the margin of appreciation for the Secretary of State to adopt policies which set out the weight to be attached to the competing considerations in striking a fair balance, including that family life established while the applicant’s stay in the UK is known to be unlawful or precarious should be given less weight, when balanced against the

factors weighing in favour of removal, than family life formed by a person lawfully present in the UK [Agyarko @ 46-53].

- 44.** It is also relevant that article 8 ECHR does not permit a person to decide where they wish to live.
- 45.** The appellant and his partner have two choices, firstly that they travel to Bangladesh together as it has not been made out that there are insurmountable obstacles preventing them continuing their family life there, including access to fertility treatment, or, secondly, the appellant can return to Bangladesh to make an application to return to the United Kingdom lawfully supported by his partner.
- 46.** The evidence does not establish the existence of exceptional circumstances in this case sufficient to outweigh the public interest in the maintenance of immigration control.
- 47.** As repeated in Agyarko, Appendix FM is said to reflect how the balance will be struck under article 8 between the right to respect for private and family life, and the legitimate aims listed in article 8(2), so that if an applicant fails to meet the requirements of the Rules it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach article 8. In this appeal no such circumstances have been made out.
- 48.** On that basis I dismiss the appeal. I find the Secretary of State has established that any interference in a right protected by article 8 is proportionate.

**Decision**

**49. I dismiss the appeal.**

Anonymity.

**50.** The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson  
Dated 25 February 2022