Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09395/2014

THE IMMIGRATION ACTS

Heard at Birmingham **Decision & Reasons Promulgated**
On 30 January 2015 **On 9 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

SAS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mustapha of Counsel
For the Respondent: Mr Mills, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

Introduction

1. The appellant, a citizen of Bangladesh, appeals to the Upper Tribunal with permission of Judge of the First-tier Tribunal Nicholson given on 29 October 2014.

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2. The appellant came to the UK as a visitor in August 2013 but not long after arriving here met her husband, Mr U, a British citizen. They married on 7 January 2014 and have recently had a child together, a girl born on 1 November 2014.

3. The Immigration Judge decided that although an application for further leave to remain was made on the grounds of being the partner of a British national on a ten year route to settlement, it seems that the appeal to the First-tier Tribunal was allowed solely on the grounds that Article 8 of the European Convention on Human Rights (ECHR) was engaged. Accordingly, the Immigration Judge decided that the respondent's decision had been unlawful because she considered the appellant would find it difficult to "self care" or indeed to travel back to Bangladesh whether on her own or escorted by her husband. She did not speak English well which was a factor the judge took account of. She also took account of the fact that the appellant was pregnant, although she could not determine the nationality of the child when born. She described the appellant and the sponsor as being "foolhardy" but having created a situation where the appellant is likely to give birth to an English born child she concluded that it would be a breach of their human rights to be returned to Bangladesh.

The Hearing

4. At the hearing both representatives made submissions. The respondent's representative, Mr Mills, pointed out that the application could not succeed under the Immigration Rules and had been weak under the ECHR. The appellant had been here as a visitor and there was a strong public interest in ensuring that visitors complied with the terms of their leave. The appellant had chosen to completely ignore those requirements, did not meet the income threshold required and had been dependent on the NHS for medical treatment. Even if the appellant had formed a private or family life in the UK it would be reasonable for her to go back to Bangladesh, with her child if necessary.

5. The appellant, on the other hand, submitted that the Immigration Judge had looked at the Immigration Rules but concluded that the requirements were not met. An additional point was that the appellant suffered from medical problems. These were set out in the determination. The circumstances were therefore sufficiently compelling to apply Article 8 on a freestanding basis. Some of the conclusions were accepted as being "generous" but they were nevertheless open to the Tribunal, the decision being one the First-tier Tribunal was entitled to come to.

6. It was then submitted on behalf of the respondent that it was relevant to the application that the appellant spoke little or no English, could reasonably relocate to Bangladesh and the appellant and her husband were a long way short of meeting the maintenance requirement of £18,600. It was further submitted on behalf of the respondent that the Immigration Judge had come to a decision not reasonably open to her on the evidence and the proportionality of removal was proportionate in all the circumstances. The respondent indicated that given the financial requirements of

the Immigration Rules were not met, the appellant's use of the NHS was a factor properly to take into account. The UK sponsor was from a Bangladeshi background and could go and live with his wife in Bangladesh.

My Conclusions

7. As I indicated to the parties at the hearing in summary form, I did not accept the appellant's submission that the decision of the First-tier Tribunal was open to her on the evidence.

8. The Immigration Act 2014 made important changes to the Nationality, Immigration and Asylum Act 2002. Specifically, it required a Tribunal seized with determining a decision under the Immigration Act where breaches of a person's right to respect for his private or family life under Article 8 were concerned, to have regard to Section 117B. Section 117B contains a number of important public interest considerations applicable to all cases. These include having regard to:

    (1) The maintenance of effective immigration control in the public interest.

    (2) The interests of economic well-being of the UK including the need for immigrants to be able to speak English and integrate into society.

    (3) The need for persons who enter or remain in the UK to be financially independent and not a burden on taxpayers.

    Section 117B (5) states that "little weight shall be given to a private life established by a person at a time when the person's immigration status is precarious".

9. It was submitted on behalf of the respondent that the Immigration Judge whilst setting out the requirements of the 2014 Act failed to have any, or any adequate, regard to the public interest and in particular the public interest of enforcing effective immigration control. I agree with the respondent's submission that the appellant had formed a family life in full knowledge of her precarious immigration status and that the Immigration Judge failed to have regard to the fact that the appellant fell a long way short of meeting the maintenance requirements of the Immigration Rules (see paragraph 276ADE). The appellant had been in the UK for a relatively short period of time and had not in any way integrated into UK society. It was in my view a significant factor that she did not have a reasonable command of the English language. Furthermore, as Mr Mills also submitted, the appellant and the sponsor's child had not been born at the date of the hearing. I understand that the appellant's husband is a British citizen who was born in the UK on 30 March 1984 but no clear reasons were given why it would not be reasonable to expect him to return to Bangladesh with the sponsor to continue their family life there. Having found that the appellant had been "foolhardy" the Immigration Judge should have gone on to ask herself why the appellant should be allowed to avoid the requirements of the

Immigration Rules. There was, in fact, no justifiable reason for the conclusion that the appellant could avoid the requirements of those rules.

10. Accordingly, as I announced at the hearing, I find that there was a material error of law in the decision of the First-tier Tribunal and I set aside that decision. I proceed to re-make the decision.

11. The only change of circumstances since the hearing which my attention has been drawn has been the birth of the child. It is true that the child is a British citizen but it is, of course, too young to be at school. There is no suggestion that the financial circumstances of this couple have changed and no reason has been given why the sponsor cannot return to Bangladesh with his wife if that is desired. The important public interest requirements as incorporated into the law by the Immigration Act 2014 and applied to the facts of this case lead to only one conclusion: that the appellant has not established a private or family life here of such quality that it would be unreasonable to require her to return to Bangladesh. The family will then have the option of continuing their family life there. Mr Mustapha pointed out that the requirements of Appendix FM do not enable the appellant to apply "for ten year" route in circumstances where she came to the UK as a visitor. With respect, the Rules have been put in place for good reason but it may be in the future that the sponsor does meet the maintenance requirements of the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law so that it is required to be set aside.

I re-make the decision which is to dismiss the appellant's appeal against the decision of the respondent to refuse further leave to remain.

The appellant was granted anonymity in these proceedings and no challenge to that order remaining in place has been made.

The First-tier Tribunal decided not to make a fee award and that decision also stands.

Signed Date

Deputy Upper Tribunal Judge Hanbury