Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17922/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 May 2014	**On 25 July 2014**

Before

MR JUSTICE GREEN
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD MIZANUR RAHMAN

Respondent

Representation:

For the Appellant: Ms Alice Holmes
For the Respondent: Mr M Kalam

DETERMINATION AND REASONS

1. There is before the Tribunal an appeal by the Secretary of State against the determination of the First-tier Tribunal dated 10 March 2014 in which the First-tier Tribunal allowed the appellant's appeal against the decision of the Secretary of State dated 21 May 2013. In that decision the

Secretary of State rejected the appellant's application for leave to remain as a student.

2. The facts may be summarised shortly. The appellant was born on 2 April 1991. He is a national of Bangladesh. He originally came to the United Kingdom as a student with leave to remain until 20 September 2011. Subsequently the licence of the college that he was attending was revoked. He was given an extension of his visa for 60 days from 15 August 2012. He made an application on 10 October 2012 for leave to remain as a spouse of a British citizen. This was upon the basis that five days earlier, on 5 October 2012, he had concluded a civil marriage with Ms Farjana Begum, a British citizen.

3. The Secretary of State was not convinced and she found first that she was not satisfied that the marriage was genuine and subsisting; and, secondly that the sponsor, the wife, had failed to meet evidence that she could maintain and support the applicant. In particular the appellant failed to produce evidence proving that the various benefits paid to the wife were paid to her account. In fact the wife benefited from certain disability allowances. Her financial affairs were managed by her mother but sadly this meant that the money was not paid into her account directly as the Rules required. Thirdly the Secretary of State concluded that the appellant's private life claim failed given his short period of stay in the United Kingdom and the continuation of his ties back in Bangladesh.

4. The appellant's appeal to the First-tier Tribunal prevailed. The Tribunal made detailed findings about the marriage and, having heard evidence, came to the clear and unequivocal conclusion that it was genuine and valid.

5. In relation to the position adopted by the Secretary of State at the hearing the Tribunal stated in paragraphs 19 and 20 of the determination as follows:

> "19. Ms Lambert emphasised that she had looked at this case as carefully as possible, but there did appear to be a strict requirement of the Rules that the disability living allowance (the benefit payable in this case) would have to be paid into the named person's account. The Rules did not provide for a situation which was obviously the one that pertained here – that it would not have been appropriate (having regard to the special needs of the recipient) for that money to go directly into her own bank account. Ms Lambert articulated the concern which is that there must be many cases in which people who are in receipt of some kind of living allowance and/or benefit is clearly not able to property manage their affairs. But no provision is made for this in the Rules.

20. Ms Lambert did not have any other comments to make, either about the genuineness of the marriage or the circumstances of their living arrangements."

6. In paragraphs 23 to 25 of the determination the Tribunal stated as follows:

"23. So far as the requirements of the Rules are concerned it is unfortunate that a full report was not included with the application which would have enabled, perhaps, the Secretary of State's representative to exercise discretion in respect of this particular point. On the basis that the bank account is not the correct one in accordance with the specified evidence requirements it is argued that this application must fail under the Rules. I consider this to be a harsh outcome.

24. On the basis that the application does not meet the requirements of the Rules I turn to consider the application of Article 8. The cases of **Gulshan** and **Nagre** provide that normally the full consideration of a person's Article 8 human rights will be properly dealt with within the framework of the Rules. There needs to be some compelling argument for a consideration of those Article 8 rights outside the Rules. If ever there was a case (in my view) this is such a one. A mere technicality on the part of the Rules which imposes a requirement, which in this case the appellant was not able to meet, means that there are compelling arguments for considering this case under ordinary Article 8 jurisprudence. Applying the **Razgar** test, I am satisfied that family life is engaged in this case, and the proposed interference would be profound, but I recognise that proper immigration controls are to be applied in all such cases.

25. On the question of proportionality, I am quite satisfied that it would be entirely disproportionate, on the basis of the material that I have reviewed above, to require the appellant to leave the country and/or his wife to accompany him."

7. The Secretary of State appeals upon a number of bases. In the course of submissions before us today Ms Holmes, appearing for the Secretary of State, very helpfully narrowed the areas of dispute between the parties. Nonetheless there are a number of matters which we consider it appropriate to comment upon in relation to the Secretary of State's grounds.

8. The first matter that the Secretary of State originally advanced was that the Tribunal erred in accepting that the marriage was genuine and subsisting. So far as the question of the marriage is concerned we can identify no error in the Tribunal's fact-finding. It was the task of the Tribunal to investigate the facts and, if needs be, to dispel suspicions that might have lingered about the genuineness of the relationship. In this case, as is clear from the determination, the Tribunal conducted a detailed

review of the evidence. They heard oral evidence from the parties concerned. They dispelled the doubts that existed and they satisfied themselves that the relationship was genuine.

9. It is not for the Upper Tribunal to set aside findings of fact simply because the Secretary of State can point to suspicious circumstantial evidence that does not amount to an appealable point of law. As we have observed in the course of the hearing, Counsel for the Secretary of State candidly accepted that this Tribunal was now bound by the findings of fact made by the lower Tribunal, and we therefore turn to what is in reality the crux of this case, which is the approach adopted by the First-tier Tribunal towards the assessment of exceptional circumstances.

10. The first point to note is that it is now to be treated as firmly settled that a miss is a miss and that there is no such doctrine as a near miss which amounts to compliance with the Rules. In the present case the appellant failed to adhere to the Rules by virtue of a technicality. The undeniable fact that it was a technicality that resulted in the appellant failing to meet the requirements for leave does not therefore mean that an appellant is to be treated as having de facto complied. With respect to the First-tier Tribunal Judge the analysis in the determination gives every appearance of having been driven by a strong sense of injustice that the appellant's application failed under the Rules by reason only of the most technical of technicalities. With respect, this was not a correct approach to take. In the case of an applicant who fails by whatever margin to meet the Rules the Secretary of State must consider whether there are exceptional or compelling circumstances relating to that individual and furthermore weigh those circumstances, assuming they are exceptional or compelling, against the objectives of the immigration system.

11. In this connection it seems to us that the Secretary of State would be entitled to take into account the fact that an applicant for leave to remain very nearly met the Rules. This would in our view be logical since, ex hypothesi, the presence in the United Kingdom of a person who fully meets the Rules is conducive to a fair, firm and effective immigration system, and the extent to which a person falls short is therefore one piece of evidence that may legitimately be taken into consideration when determining the overall proportionality exercise which must occur outside of the Rules. Hence, in principle, it is not wrong to take into account as one part of the analysis that the only explanation why a party has failed to meet the Rules is a very technical one. But it must also logically follow that in and of itself this can never be enough because otherwise it would offend the "miss is a miss" principle. It is one piece of evidence but more is needed.

12. In the present case in paragraph 24 of the determination the Judge states that the fact that the appellant failed on a "mere technicality" means that there are compelling reasons to consider this case under ordinary Article 8 jurisprudence and that family life is engaged and that the interference is

"profound". With respect, the approach adopted is not consistent with the required approach, and in any event the reasons are inadequate.

13. The Judge was entitled to find that the marriage was genuine and subsisting. The Judge heard oral evidence upon this point including in private from the appellant's wife. Whilst the conclusions reached might appear surprising it was a decision reached on evidence and is not a finding we can disturb. However that can amount only to the starting point for the analysis.

14. The mere fact that a genuine and subsisting private life relationship existed is not determinative. There are other factors that needed to be considered including the undeniable fact that the appellant entered into the marriage when his position was precarious and when he was aware or must have been that he was at risk of removal. There were no children to consider.

15. The Tribunal Judge did not find the marriage could not subsist back in Bangladesh, we refer to paragraph 11 in this regard. Nor was it found that the appellant had lost his ties with Bangladesh. These were matters to be explored but they were not. The law is clear. When Article 8 is considered outside of the Rules there must be compelling or exceptional circumstances pertaining to the individual and very importantly there must be a balancing of the private interest as against the public interest, which is a weighing exercise that must be performed properly and not merely by asserting that the outcome is proportionate.

16. In this case, by way of illustration only, there was no assessment whether, if this case were treated as a paradigm of exceptionality, how many other cases would by parity of reasoning have to be treated as exceptional also and whether this would imply granting leave to remain to a large group of persons falling outside of the Rules.

17. We have therefore come to the conclusion that the Judge failed to apply the proper test and failed to address relevant consideration and failed to give full or adequate reasons for the ultimate decision.

18. We now have to consider what we should do. We are satisfied that whilst we cannot agree with the reasons of the Judge below we do <u>not</u> disturb the Judge's findings as to the genuineness of the marriage or the circumstances which prevail in the family life at the present time. We consider that the appropriate course is for us to remake the decision. We do not think the facts can or will will improve or alter. We therefore apply the Article 8 test outside of the Rules. We will express our conclusions on this relatively shortly.

19. We start by concluding that the facts relating to the appellant are exceptional. We take into account the proximity of the appellant and his spouse to meeting the Immigration Rules. We take account of the real effect on the wife of the marriage as set out in the Tribunal's

determination, in particular at paragraph 14. We remind ourselves that undue harshness or compassion, to put it in another way, is a relevant part of exceptionality.

20. The evidence demonstrates that the effect of the marriage has been transformative on the wife's personal, mental and social position. If the appellant were removed on the basis of the First-tier Tribunal's specific findings she would be restored to the state that she was in prior to her marriage. She suffers from a degree of mental impairment such that she cannot manage her own affairs without a person to depend upon. Since the marriage that person is her husband. We therefore, on very particular facts, conclude that there are exceptional and compelling circumstances.

21. We now must consider the second aspect of the proportionality test, which is to measure those facts against the public interest arising. In this regard two matters influence us. First, the purpose of the Rules requiring direct payment of monies into the account of a sponsor is not in our view thwarted on the very unusual facts of this case. It was found by the First-tier Tribunal and is not disputed here that the reasons for the money being paid into the sponsor's account in the first instance were entirely genuine. Secondly, given the highly unusual circumstances of this case, we do not consider that permitting the appellant to remain would create any form of a precedent or open the door to any wide category of persons being able to argue by analogy. We therefore conclude that the impact upon the important public interest objectives pursued by the Secretary of State is extremely limited.

22. For these reasons, and notwithstanding that we have found that the Tribunal erred in law, we propose to uphold the final determination of the Tribunal which was to permit the appeal of the appellant against the Secretary of State's decision.

Signed Date

Mr Justice Green