Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27144/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 10th June 2014	**On 8th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

AFSANA BEGUM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M K Mustafa of Kalam Solicitors
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, who is from Bangladesh, came to the United Kingdom as a visitor on 26th December 2012. On 4th March 2013 she married Mohammed Monu Miah ("the Sponsor"), who is a British citizen. She applied through solicitors for variation of her leave. This was refused by

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the Respondent on 17th June 2013 and a decision was made under Section 47 of the Immigration, Asylum and Nationality 2006 to remove her to Bangladesh. The basis of refusal was that the Appellant did not meet the eligibility requirements of Appendix FM to the Immigration Rules as she was in this country as a visitor (E-LTRP.2.1(a)) and she did not meet the requirements of paragraph 276ADE of the Rules. She had lived here for a very limited period and she had ties in Bangladesh. The refusal letter went on to consider whether there were particular circumstances constituting exceptional circumstances under Article 8 ECHR but it was stated that both she and the Sponsor would have been aware of her immigration status when they married and of the possibility that they might not be able to continue the relationship in the United Kingdom. She had stated that she was unable to return home because she had a kidney infection but she had been discharged from hospital with a prescription of antibiotics. She had said that she was unable to fly because she was pregnant but that was not accepted. There was no basis for the matter to be considered outside the Rules.

2. The Appellant appealed against those decisions under Section 82 of the Nationality, Immigration and Asylum Act 2002. Her appeal was heard before First-tier Tribunal Judge Stott at the Birmingham hearing centre on 3rd December 2013. In a determination promulgated on 11th December 2013 the appeal was dismissed both under the Immigration Rules and with regard to human rights. Judge Stott heard evidence from the Appellant and from the Sponsor. In his findings he accepted that there was a valid marriage but noted that the arrangements had been conducted extremely swiftly and they had married within three months of her arrival. He clearly had doubts about the suggestion that the proposed marriage had not been arranged prior to her arrival. He found no reason why she could not return to Bangladesh for health reasons. He noted that her family had attended the wedding ceremony and there was no suggestion that they would refuse to house and welcome her in Bangladesh. She could not rely upon paragraph EX.1 of Appendix FM as the Rules were clear that EX.1 was not applicable in the case of a visitor. He did not accept the reasons given for the enhancement of the Sponsor's salary. He noted that the Sponsor was prepared to return to Bangladesh with the Appellant whilst an application for entry clearance was made. He did not find that there were compelling or exceptional circumstances which might have entitled the Appellant to succeed under Article 8 ECHR.

3. The Appellant applied for permission to appeal, arguing that the judge had been obliged adequately to take into account the Appellant's pregnancy and he should have reached the conclusion that this amounted to compelling and exceptional circumstances. The child had expected to be born on 21st January 2014. The Appellant was in a familial relationship which was affected by the decision. He should have taken account of the impact of the decision on other members of the Appellant's family, the Sponsor and expected child and was under a duty to have regard to the welfare of the child. He was wrong to consider that it was appropriate to expect the Appellant and Sponsor to return to Bangladesh and had failed

to recognise the *ratio* in **Chikwamba v SSHD [2008] UKHL 40** in concluding that the Appellant should apply for entry clearance from Bangladesh.

4. Permission was initially refused but the application was renewed to the Upper Tribunal. It was granted by Upper Tribunal Judge Kopieczek on 25th March 2014. He commented that the renewed Grounds of Appeal did not suggest that the judge had been wrong to conclude that the Appellant was not able to meet the requirements of the Immigration Rules. The judge had given consideration to the fact that the Appellant was pregnant at the date of hearing and did give consideration to the best interests of the child, even assuming that there was a need to consider the best interests of an unborn child. Although the judge found that the Appellant could return to Bangladesh with the Sponsor (and child) to make an application for entry clearance, he granted permission in terms of the point made in the grounds in relation to the decision in **Chikwamba**, although the grant was not limited. In a response under Upper Tribunal Procedure Rule 24 the Respondent contended that the judge had directed himself appropriately and there was no material error.

5. At the commencement of the hearing Mr Mustafa handed in his detailed skeleton argument upon which he relied. He contended that there were two issues, whether the judge had materially erred by finding that the Appellant could return to Bangladesh with her husband and child to make an entry clearance application and whether he had similarly erred by dismissing the appeal on human rights grounds. He relied in particular on extracts from **Chikwamba** and from **SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054**. The dismissal of the appeal on the basis that the Appellant could return to Bangladesh to seek entry clearance was a breach of Article 8, particularly as the Appellant had a genuine and subsisting relationship with her husband and child. The enforcement of the immigration requirement of Appendix FM was said to be disproportionate. There was no guarantee that the Appellant would be granted entry clearance, which would deprive the child of the benefits of British citizenship. The judge, it was said, should have decided the Article 8 claim comprehensively following **R v SSHD ex parte Razgar [2004] UKHL 27,** despite the Appellant's visitor status. It was put to Mr Mustafa that as at the date of hearing the Appellant had not given birth to her child; he said that the judge was aware that she was expecting the child and he should not have disregarded the consequences.

6. In response Mr Smart relied upon the Rule 24 response. He said that the judge had addressed all the relevant issues and had made clear findings of fact at his paragraphs 11 to 17. He had arrived at conclusions open to him. He did consider the Appellant's pregnancy but the child was unborn and as such had no Article 8 rights. The prospects of success on a future application were not a matter for the judge to consider. Mr Smart referred to paragraph 24 of **Hayat**. He relied on the summary at paragraph 30 of that case but referred me to other sections, notably paragraphs 50 to 52. He said there were similarities with the current case. **Hayat** had been

decided in the wake of **Chikwamba** but without the difficulties which the Appellant in **Chikwamba** was likely to face in Zimbabwe. He handed in a document showing the length of time necessary to deal with settlement visa applications both in Dhaka and in Sylhet. He submitted that the times were modest.

7. He continued saying that there were no compelling circumstances to take the matter to be considered outside of the Rules. The judge had doubts about the Sponsor's income. He dealt with the Appellant's medical condition and also had doubts about previous contact and prior arrangements for the match. Furthermore the husband was prepared to return to Bangladesh with the Appellant whilst an application was made. Pregnancy was not a compelling circumstance and had not in itself been challenged.

8. Finally Mr Mustafa said that the judgment in **Hayat** did not override the *ratio* in **Chikwamba** but rather assisted in its interpretation. The judge had found that there was a valid marriage and, he submitted, financial circumstances were not relevant. The compassionate circumstances were the pregnancy. He said to expect a British woman to fly out and give birth in another country would be disproportionate and that was similarly the case with this appeal.

9. Having considered those submissions I reserved my determination which I now give. I have come to the view that Judge Stott did not make a material error of law in his determination for the following reasons. It was clear that the Appellant could not meet any of the requirements of the Immigration Rules. It is now apparent from numerous judgments, following the changes in the Immigration Rules introduced in July 2012, that the Rules themselves must be borne in mind, As has been stated by Lord Justice Beatson in **Haleemudeen v SSHD [2014] EWCA Civ 558** (at paragraph 40) the Rules now address Article 8 issues. The guidance in **R (Nagre) v SSHD [2013] EWHC 720 (Admin)** and **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)** make it clear that only if there are arguably good grounds for granting leave outside the Rules is it necessary to go on to consider Article 8. That view is endorsed in **Haleemudeen**. At paragraph 44 Lord Justice Beatson said:

> "Mr Richardson's preferred position was that the Rules are only the starting point for an assessment of proportionality. It was with evident reluctance that he accepted that, at least in this court, in the light of the authorities, it is necessary to find 'compelling circumstances' for going outside the Rules …"

10. Chikwamba was a case of a woman with a child from Zimbabwe who had married a Zimbabwean citizen with refugee status who could not return to that country. It seemed she was likely to be granted entry clearance if she returned to Harare to make an application from there. The present case is readily distinguished as at the date of hearing the Appellant did not have a child, the Sponsor said that he was willing to return to Bangladesh with her

while she made an application and there were doubts as to whether she was in a position to meet all the requirements of the Rules, for the reasons set out by the judge.

11. At paragraph 30 of **Hayat** Lord Justice Elias summarised the relevant principles relating to whether an applicant should be obliged to return to the home country to make an entry clearance application. He stated that each case was fact-sensitive but where Article 8 was engaged it would be a disproportionate interference with family life to enforce a policy of return to make application unless there was a sensible reason for doing so. At paragraph 50 he referred to the length and degree of family disruption being a highly relevant factor. He went on at paragraph 51 to state:

> "In my judgment these were all proper considerations to weigh in the balance when considering the merits of the Article 8 claim. As the Secretary of State pointed out in her submissions there is strong Strasbourg and domestic authority to the effect that only in exceptional circumstances will a couple who have formed a union in full knowledge of the precarious immigration status of either of them be entitled to remain pursuant to Article 8 rights: see **Y v Russia [2010] 51 EHRR 21** paragraph 104."

The documents submitted by Mr Smart indicated that at the Sylhet post 76% of settlement applications were dealt with within 30 days, 83% within 60 days and 91% within 90 days. At Dhaka 83% were dealt with within 30 days, 95% within 60 days and 100% within 90 days. The Appellant has her parents and siblings in Bangladesh. The couple married at a time when she could not have obtained leave to remain under the Rules as a spouse. It is not clear that she would meet all of the requirements of the Immigration Rules at the moment as the judge expressed doubts concerning the Sponsor's income, which appeared to have increased greatly of late. The child had not been born as at the date of the hearing or promulgation of the determination and the child's best interests did not fall to be addressed as the child had no separate existence. This view is consistent with that expressed by the Court of Appeal in **CA v SSHD [2004] EWCA Civ 1165**. The judge was well aware of the Appellant's pregnancy. It is the case that the Appellant herself had been born in Bangladesh, her parents and siblings live there and her husband was prepared to travel with her whilst an application was made. The judge found that there was no medical reason to prevent her travelling.

12. The question then is whether the judge erred in failing to proceed to consider Article 8 beyond the Rules which have been approved by Parliament. He did not expressly refer to **Gulshan**, **Nagre** or any of the other case law but he did follow the principles of those cases. He did not find that there were compelling or exceptional circumstances which might have enabled the Appellant to succeed under Article 8. That was an approach that was clearly open to him and does not reveal an error of law on his part. This appeal accordingly falls to be dismissed.

Decision

The determination of Judge Stott did not contain a material error on a point of law and his decision that the appeal be dismissed under the Immigration Rules and on human rights grounds therefore stands.

Signed Date 03 July 2014

Deputy Upper Tribunal Judge French