Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/16776/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th September 2015	**On 14th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Md FAJLUR RAHMAN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M K Mustafa of Kalam, solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal, but in order to avoid confusion, the parties are referred to as they were in the First Tier Tribunal. This is an appeal by the Secretary of State against the decision of First Tier Tribunal Judge Knowles, promulgated on 17 March 2015, which allowed the appellant's appeal against the respondent's decision dated 20

March 2014 to refuse the appellant leave to remain in the UK and to give directions for his removal.

Background

3. The appellant was born on 15 April 1979 and is a national of Bangladesh.

4. On 17 February 2014, the appellant applied for further leave to remain in the UK as a student. The respondent refused the appellant's application on 20 March 2014. The appellant appealed against that decision on 7 April 2014 on grounds which related entirely to his pursuit of education in the UK. In addition, he argued that his pursuit of academic study in the UK created private life within the meaning of Article 8 ECHR which would be breached by his removal.

5. On 10 October 2014, the appellant filed a statement of additional grounds under Section 120 of the Nationality, Immigration and Asylum Act 2004. In that Section 120 notice, the appellant claimed that he qualified for leave to remain as a partner under Section R-LTRP of Appendix FM to the Immigration Rules following his marriage to a British citizen on 3 September 2014.

The Judge's Decision

6. The appellant appealed the respondent's decision of 20 March 2014 to the First Tier Tribunal. First Tier Tribunal Judge Knowles ("the judge") allowed the appeal against the respondent's decision, finding that the appellant fulfilled the requirements of Appendix FM of the Immigration Rules. In doing so, the judge found that the appellant's application for leave to remain in terms of Appendix FM was made when the Section 120 notice was served on 10 October 2014.

7. Grounds of appeal were lodged and on 18 May 2015, First Tier Tribunal Judge Lever granted permission to appeal, stating *inter alia*:

> "It is arguable that the judge had not applied the correct period of production of financial documents, that being the six month period prior to the date of application."

The Hearing

8. Mr Tarlow, for the respondent, focused on [54] and [55] of the judge's decision and referred me to Paragraph 2(a)(i) of Appendix FM-SE which specifically sets out a requirement for payslips covering *"a period of six months prior to the date of application..."* He told me that that provision was written in unambiguous and straightforward terms and was not capable of the interpretation given to it by the judge in [54] and [55] and, that had a correct interpretation been placed on that provision, the appeal could not have been allowed under the Immigration Rules.

9. Mr Mustafa argued for the appellant that there is a conflict between primary and secondary legislation. He referred to Section 85(2) and Section 85(4) of the Nationality, Immigration and Asylum Act 2002. He relied on Patel and others v SSHD [2013] UKSC 72 and SS Congo [2015] EWCA Civ 387, and argued that there is no error in the judge's decision. The judge was obliged to consider all matters placed before him because of the operation of Section 85 of the 2002 Act and said that the apparent conflict between primary and

secondary legislation can only be resolved by a purposive interpretation of the Immigration Rules.

Analysis

10. There is no conflict between primary and secondary legislation. Section 85 of the 2002 Act requires a tribunal to consider any matter raised in the grounds of appeal and, to an extent, that is what the judge did. Unfortunately, in considering all of the matters raised, the judge incorrectly interpreted Paragraph 2 of Appendix FM-SE.

11. There is force in Mr Tarlow's submission that Paragraph 2 of Appendix FM-SE is written in unambiguous terms. It demands payslips covering *"(i) a period of six months prior to the date of application..."* There is a difference between the date of application and the date of lodging of the Section 120 notice (in this case, seven months after the date of decision appealed against). The harsh truth is that although the appellant and his wife have produced a sequence payslips covering a six month period, they have produced payslips for the wrong period. The application was made in February 2014. The payslips should therefore date from September 2013 to complete the six months sequence required by Paragraph 2 of Appendix FM-SE. The judge correctly found (at [54]) that the earliest payslip (and so the commencement of the six month period) is dated October 2013. The straightforward terms of Appendix FM-SE cannot be fulfilled.

12. I therefore find that the decision promulgated on 17 March 2015 is tainted by a material error of law and must be set aside.

13. Although I set aside the decision promulgated on 17 March 2015, I preserve the findings made by Judge Knowles and so go on to decide the appeal of new.

14. The judge found that the appellant and the sponsor were credible witnesses, that they are married and that the sponsor is pregnant with their first child. The original decision was made in terms of paragraph 322(1) of the Immigration Rules. Paragraph 322 (1) of the rules sets out a mandatory refusal because the variation of leave was sought for a purpose not covered by the Rules. At [48], the judge found that that decision was "*unassailable*". No challenge is raised to that decision. The focus in this case was on Section R-LTRP of Appendix FM.

15. It is beyond dispute that the date of application was February 2014. It is equally beyond dispute that a sequence of payslips starting in October 2013 was produced. October 2013 is five months prior to the date of submission of the application. Because the payslip for September 2013 has not been produced, the appellant cannot fulfil the requirements of the Immigration Rules.

16. It is submitted that the appellant's rights in terms of Article 8 ECHR are breached and that the facts and circumstances of this case merit consideration of Article 8 out-with the Rules.

17. R (on the application of Esther Ebun Oludoyi & Ors) v SSHD (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) in which it was held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) to indicate that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

18. In Khan (2015) CSIH 29 the Inner House found in favour of immigrant spouses who challenged refusals to grant leave to remain. The Court ruled that there was no human rights rule that an immigrant, who married a UK national at a time when their immigration status was uncertain, must establish "*exceptional circumstance*" before removal could amount to a breach of Article 8 of the ECHR.

19. The only reason that the appellant does not fulfil the requirements of the Immigration Rules is because one month’s payslip is missing. All of the other requirements of the Immigration Rules are met. It is not disputed that the appellant is married to a British citizen and that their first child is due on 15 October 2015.

20. Section 117 of the Nationality Immigration and Asylum Act 2002 is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within Razgar.

21. Maintenance of fair and effective immigration control is in the public interest but against that, the appellant can speak English and the appellant is financially independent so that Section 117B(2) and 117B(3) weigh in the appellant’s favour.

22. The appellant formed his relationship with his wife at a time when his immigration status was precarious, but that is of limited relevance. Section 117B(4) is not engaged because the appellant has never been in the UK unlawfully. Section 117B(5) relates to the establishment of private life whilst

immigration status is precarious (not family life). Section 117B(6) has no relevance to this case.

23. The effect of implementation of the respondent's decision is that the appellant would be removed to Bangladesh and separated from his British citizen wife and, by the time removal is effected, separated from a British citizen child. The appellant (and his wife) would have to face a period of uncertainty whilst the appellant applies for entry clearance from abroad.

24. In EB (Kosovo) (FC) v SSHD 2008 UKHL 41 the House of Lords said the Tribunal should "*recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal or if the effect of the order is to sever a genuine and subsisting relationship between parent and child".*

25. In Chikwamba (FC) v SSHD 2008 UKHL 40 the House of Lords said that in deciding whether the 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.

26. In Beoku-Betts (FC) v SSHD 2008 UKHL 38 the House of Lords accepted that the Tribunal is concerned with the effect of the decision on all members of the family.

27. When I weigh all of these matters, I find that there are more factors weighing in the appellant's favour than those against the appellant. I cannot see that it is in the public interest to separate the appellant from his pregnant wife because the absence of one piece of paper means that the rigid terms of one clause in the Immigration Rules are not met when all of the other Rules are met.

28. I therefore find that there are good grounds for considering this case out-with the Immigration Rules and that the respondent's decision amounts to a disproportionate breach to the appellant's right to respect for family life in terms of Article 8 ECHR.

Decision

29. There was a material error on a point of law in the decision of the First-tier Tribunal with regard to Article 8 such that the decision is set aside

30. I remake the decision.

31. I allow the appeal on Article 8 ECHR grounds.

Signed Date

Deputy Upper Tribunal Judge Doyle