**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/00844/2016**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision and Reasons Promulgated** |
|---|---|
| **On 21 November 2017** | **On 24 November 2017** |

**Before**

**MR JUSTICE JULIAN KNOWLES**
**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**RAZA MIAH**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**ENTRY CLEARANCE OFFICER (NEW DELHI)**

Respondent

**Representation:**

For the appellant: Mr R. Khosla, Counsel instructed by D J Webb & Co. Solicitors
For the respondent: Mr E. Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appealed the respondent's decision to refuse a human rights claim in the context of an application for entry clearance as a spouse under Appendix FM of the immigration rules.

2. A First-tier Tribunal Judge dismissed the appeal in a decision promulgated on 25 May 2017. The Upper Tribunal concluded that the First-tier Tribunal decision

involved the making of errors of law and set aside the decision on 08 September 2017 for the following reasons:

(i) The First-tier Tribunal failed to consider that it was in the public interest to encourage those who are unlawfully in the UK to make voluntary departures in order to regularise their immigration status by way of an application for entry clearance.
(ii) The First-tier Tribunal failed to give sufficient weight to the fact that the appellant's child is a British citizen.
(iii) In assessing the financial requirements, the First-tier Tribunal failed to consider the appellant's potential earnings following the Supreme Court decision in *R (on the application of MM (Lebanon)) v SSHD* [2017] UKSC 10.

3. The case was listed for a resumed hearing to remake the decision. We have considered the oral and written arguments and the documentary evidence.

**Decision and reasons**

*Scope of the appeal*

4. A human rights application made on or after the 06 April 2015 gives rise to a 'new style' appeal following amendments made to the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") by the Immigration Act 2014 ("IA 2014"). Other applications might be subject to transitional and saved provisions, which are not applicable to this appeal. Section 113 of the NIAA 2002, which defines a 'human rights claim', was amended by Part 4 of Schedule 9 of the IA 2014 and came into force on 20 October 2014 (subject to transitional and saved provisions). Section 113 makes clear that a refusal of entry clearance can amount to a human rights claim.

> 'human rights claim' means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom [or to refuse him entry into the United Kingdom] would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Convention).

5. Paragraph GEN.1.1 of Appendix FM states that the requirements of the immigration rules reflect how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aim of maintaining an effective system of immigration control. The respondent's policy "Rights of Appeal" Guidance (Version 6.0 – 09 October 2017) sets out the circumstances in which she will treat an application as a human rights claim. The respondent's position outlined in the immigration rules and policies does not preclude a claim amounting to a human rights claim on the facts: see *R (on the application of AT) v SSHD* [2017] EWHC 2589 (Admin).

6. The entry clearance application was made on 30 October 2015. The respondent refused the application in a decision dated 08 December 2015. An application for entry clearance as a family member under Appendix FM is a 'human rights claim'.

The appellant has a 'new style' right of appeal under section 82(1)(b) of the NIAA 2002 against the respondent's decision to refuse a human rights claim.

7. The long standing position under section 85A(2) NIAA 2002 was that the Tribunal could only consider "the circumstances appertaining at the time of the decision" in an appeal against a decision to refuse entry clearance. Part 4 of Schedule 9 of the IA 2014 repealed section 85A on 20 October 2014 (subject to transitional and saved provisions). Section 85(4) NIAA 2002 is the only remaining provision relating to the assessment of evidence in 'new style' appeals, which states:

> (4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

8. The consequence of these changes is that the Tribunal is no longer required to consider the circumstances appertaining at the time of the decision in a 'new style' appeal involving an entry clearance decision. There is a right of appeal against a decision to refuse a human rights claim. Whether an appeal relates to the refusal of a human rights claim in the context of refusal of leave to enter or leave to remain the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

9. Section 85(4) no longer restricts the consideration of evidence in an appeal against an entry clearance decision, but other provisions might still impose limitations in practice. If applicable, section 85(5)-(6) NIAA 2002 might restrict the scope of the Tribunal to consider evidence relating to 'new matters'. Another example might be if the Tribunal is considering the evidential requirements of the immigration rules as part of an overall human rights assessment. The rules might specify the nature of the evidence required. For example, the financial requirements of the immigration rules require evidence of income for specified periods of time prior to the date of application.

10. The repeal of section 85A of the NIAA 2002 harmonises the treatment of evidence in 'new style' statutory appeals. The Tribunal can now consider all 'new style' appeals on the evidence as it stands at the date of the hearing subject to any limitations that might be imposed by other provisions.

*Factual background*

11. The factual background is not disputed. The appellant entered the UK in 2005 with entry clearance as a work permit holder. He overstayed and continued to work in the UK without permission. He was caught working illegally on 28 May 2009. When interviewed by the authorities he gave a false name. He was released and required to comply with reporting conditions. He failed to report and was treated as an absconder. The appellant made a human rights application on 03 November 2009, which was refused on 06 May 2010. The appellant remained in the UK in the knowledge that he had no leave to remain. He made a voluntary departure on 04 December 2013.

12. The appellant met his wife in Bangladesh on 09 December 2013. They married on 10 January 2014. Given that it was an arranged marriage it is reasonable to infer that the appellant left the UK because of the impending marriage. However, there is no suggestion that this is anything other than a genuine and subsisting marriage. The appellant's wife is a citizen of Bangladesh who is settled in the UK. The couple lived together in Bangladesh until 03 May 2014 when she returned to the UK. She has visited the appellant in Bangladesh. Their son was born on 08 September 2014. He is a British citizen.

13. The Entry Clearance Officer (ECO) refused the application under paragraph 320(11) of the general grounds of refusal because it was said that he had previously contrived in a significant way to frustrate the intentions of the immigration rules. The ECO was not satisfied that the appellant had produce the specified evidence required to show that he met the financial requirements of the immigration rules. The appellant's family life was only considered as an alternative to the rules. The ECO concluded that there were no 'exceptional circumstances' that justified granting entry clearance. The ECO's consideration of the best interests of the child were confined to the following statement:

> "I have also considered the best interests of the child in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009, but I am still satisfied that the decision to refuse your application is an appropriate one."

*Human rights assessment*

14. The appellant is in a genuine and subsisting relationship with a person who is settled in the UK and therefore meets the 'Eligibility' requirements of the immigration rules. The couple have three-year-old son who is a British citizen. He lives with his mother in the UK. The effect of the decision is to prolong the separation of the appellant from his wife and son. For these reasons, we concluded that the decision to refuse entry clearance shows a lack of respect for the appellant's family life that is sufficiently grave to engage the operation of Article 8 (points (i) & (ii) of Lord Bingham's five stage approach in *Razgar v SSHD* [2004] INLR 349).

15. The state can lawfully interfere with a person's family life if it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the case. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see *Hesham Ali v SSHD* [2016] UKSC 60.

16. In so far as the requirements of the immigration rules might form one part of a private and family life assessment undertaken by the Tribunal under Article 8, any

requirements for evidence covering a certain period of time prior to the application might need to be considered. If an appellant meets the requirements of the immigration rules it is likely to provide a strong indication of where the balance should be struck. However, the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including any matter arising after the decision, as part of a holistic assessment of the human rights claim. Whether the appellant meets the strict requirements of the immigration rules might form one part of that overall assessment.

17. The respondent's assessment of the public interest is outlined in several places in the immigration rules and in statute. The fact that an appellant previously overstayed or used deception leads to mandatory refusal under paragraph 320(7B). However, paragraph A320 makes clear that paragraph 320(7B) does not apply to applications for entry clearance as a family member under Appendix FM. Even if it did, paragraph 320(7B)(iii) states that 320(7B) does not apply if the appellant left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State, more than 12 months before the application.

18. The scheme of paragraph A320 and 320(7B) appears to have two main objectives (i) to recognise the importance of family life issues; and (ii) to reflect the public interest in encouraging those who have breached the immigration laws to make a voluntary departure at their own expense. The appellant was not liable to mandatory refusal because (i) he made an application for entry clearance under Appendix FM; and (ii) he left the UK voluntarily at his own expense at least 12 months before making the entry clearance application.

19. It was open to the respondent to consider whether the appellant's immigration history was so poor that it still justified refusal under paragraph 320(11). Given the recognition of the importance of family life issues in paragraph A320 of the rules, paragraph 320(11) should only be used in cases where an appellant's immigration history shows that he has "previously contrived in a significant way to frustrate the intentions of the rules". The fact of overstaying, breaching a condition or using deception is not enough. The threshold is only reached when there are aggravating circumstances such as absconding, breaching temporary admission/reporting conditions, failure to comply with bail conditions or using an assumed identity. The rule provides a non-exhaustive list of examples.

20. Mr Khosla argued that the appellant did not 'contrive', within the dictionary definition, to frustrate the intentions of the rules, but the argument is semantic and unpersuasive when the appellant readily admitted that he knew he was overstaying and that he gave a false name to the authorities out of fear and panic. He would have been informed of the reporting requirements but knowingly failed to comply. When his human rights claim was refused in May 2010 he remained in the UK for another three years before making a voluntary departure. It is reasonable to infer that he left to contract a marriage with a Bangladeshi citizen who is settled in the UK. Nevertheless, there is no dispute that it is a genuine and subsisting marriage. Rather than attempting to marry in the UK and then seek to regularise his status, the

appellant did what the policy outlined in the rules is intended to encourage, which is to make a voluntary departure to apply for entry clearance through the proper channels.

21. We find that the appellant's immigration history discloses aggravating factors identified in paragraph 320(11) of the immigration rules. In addition to overstaying and using deception by giving a false name, the appellant breached the requirements of temporary admission and reporting conditions as well as working illegally in the UK. However, even if the higher threshold under paragraph 320(11) is met, the respondent must still consider whether it is appropriate to exercise discretion in all the circumstances of the case. The current policy on the application of paragraph 320(11) ("General Grounds for Refusal" Modernised Guidance - 10 April 2017) states:

> "This is not a complete list of offences. You must consider all cases on their merits and take into account family life in the UK and, if the applicant is a child, the level of responsibility for any breach. Before you decide to refuse under this paragraph, you must refer your decision to an entry clearance manager (ECM) to be authorised."

22. Elsewhere, the respondent's policies recognise that it would not be reasonable to expect a British child to leave the European Union with a parent or primary carer, or to expect the child to be separated from a parent, unless there are strong public policy considerations such as criminality or a "very poor immigration history": see Immigration Directorate Instructions: "Appendix FM Section 1.0b Family Life (as a partner or parent) and Private Life: 10 Year Routes" (August 2015) referred to in *MA (Pakistan) & Ors v UT (IAC) & SSHD* [2016] EWCA Civ 705.

23. The respondent's consideration of the appellant's family life was confined to the question of whether there were any 'exceptional circumstances' that might justify a grant of entry clearance outside the rules, when it should have been considered as part of the overall assessment of whether it was appropriate to refuse the application under paragraph 320(11). The bare statement that her duties under section 55 of the Borders, Citizenship and Immigration Act 2009 ("BCIA 2009") had been considered was wholly inadequate when the case involved the long-term interests and welfare of a British child.

24. In assessing the best interests of the child, we have considered the decisions in *ZH (Tanzania) v SSHD* [2011] UKSC 4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of the child are a primary consideration, but may be outweighed by the cumulative effect of other matters that weigh in the public interest.

25. The respondent must have regard to the need to safeguard the welfare of children who are "in the United Kingdom". We take into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55. In the guidance, the respondent acknowledges the importance of international human rights instruments including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "*The UK Border Agency must fulfil the requirements of these*

*instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies."* The UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.

26. The fact that the child is a British citizen is a matter of intrinsic importance. The child is entitled to the benefits of citizenship and the wider benefits of European citizenship. The fact that he may also be a citizen of Bangladesh does not diminish those rights. His parents clearly consider that it is in his best interests to live in the UK, even though this means that he has now been separated from his father for some time. It is in the best interests of a child to be brought up by both parents. The younger the child the more important the involvement of a parent is likely to be: see *Berrehab v Netherlands* (1988) 11 EHRR 322.

27. On behalf of the respondent it was argued that it would be reasonable for the child to live with his parents in Bangladesh. This would appear to be contrary to the respondent's policy outlined above [21] where it is recognised that it would be unreasonable to expect a British child to leave the EU with a parent or primary carer. Having considered all the circumstances, we conclude that it is in the child's best interests to live in the UK with both parents where he can continue to benefit from the rights derived from his citizenship.

28. Section 117B of the NIAA 2002 sets out a number of public interest considerations that a court or tribunal must take into account in assessing whether an interference with a person's right to respect for private and family life is justified and proportionate. In *AM (Section 117B) Malawi* [2015] UKUT 260 the Upper Tribunal found that the duty to consider section 117B only extended to the provisions that were relevant to the facts of the case.

29. Section 117B(1) states that the maintenance of an effective system of immigration control is in the public interest. The fact that the appellant previously contrived in a significant way to frustrate the intentions of the immigration rules is a matter that must be given significant weight. However, the immigration rules also recognise that the fact of overstaying or use of deception are not sufficient to justify mandatory refusal in an application for entry clearance as a family member under Appendix FM and seek to encourage those who have overstayed to make a voluntary departure at their own expense. We also note that the 'Suitability' requirements for entry clearance as a family member under Appendix FM do not specifically exclude an applicant for previous breaches of immigration law.

30. The public policy considerations relating to English language (section 117B(2)) and financial independence (section 117B(3)) apply to those who seek to "enter and remain" in the UK i.e. the public interest considerations apply to applications for entry clearance as well as in-country applications for leave to remain.

31. The requirements for entry clearance under Appendix FM address both public policy considerations. The respondent took no issue with the 'English language' requirement contained in E-ECP.4.1-4.2 of Appendix FM. The appellant lived in the UK for several years. There is no evidence to suggest that he would be a burden on taxpayers or that he is less able to integrate because of a lack of English language skills.

32. The respondent refused the application because the appellant failed to produce evidence of the sponsor's income in the specified format. The fact that the sponsor earned a gross income of £18,800 was not disputed. The sponsor produced payslips for the six-month period before the date of the application, but the official bank statement available at the date of the application did not cover the period containing the last salary payment on 16 October 2015. To evidence this payment the sponsor produced an electronic copy of her bank statement. The respondent was not satisfied that it met the evidential requirements of Appendix FM-SE because it was not accompanied by a letter from the bank or official stamps and did not include her name. At the hearing before the First-tier Tribunal the sponsor produced the official bank statement covering the period from September to October 2015. The bank statement shows her name, address, account number and the official bank logo. The statement confirms the missing salary payment on 16 October 2015. Given that this was the only reason for refusal under Appendix FM we conclude that the appellant has produced sufficient evidence to show that he met the requirements of the immigration rules.

33. The immigration rules are said to reflect where a fair balance should be struck under Article 8. We find that no public policy considerations arise under section 117B(3) because the appellant met the financial requirements of the immigration rules. He will not be a burden on taxpayers and is better able to integrate into society because the family is financially independent. For the sake of completeness, the fact that the appellant worked in the UK in the past (albeit illegally) indicates that he would be able to contribute to the family income. This is a matter that can also be considered following the Supreme Court decision in *MM (Lebanon)* and is reflected in recent changes to the immigration rules (HC 290). For these reasons, we conclude that the public policy considerations underpinning the financial requirements of the immigration rules are satisfied.

34. Not all of the public interest factors outlined in section 117B are relevant to an application for entry clearance. Section 117B(4) states that little weight should be given to a private life or a relationship formed with a qualifying partner that is established at a time when the person is "in the United Kingdom unlawfully". In this case the appellant established a relationship with the sponsor after he left the UK. It is not disputed that it is a genuine and subsisting relationship and that the appellant met the 'Eligibility' and 'Relationship' requirements of the Appendix FM.

35. Similarly, section 117B(6) states that the public interest does not require the "removal" of a person from the UK when a person has a genuine and subsisting

parental relationship with a "qualifying child" and it would be unreasonable to expect the child to leave the UK. The reference to "removal" shows that the strict wording is not applicable to applications for entry clearance. However, the general principles relating to the respect that should be accorded to the right to family life must form part of an overall human rights assessment in an entry clearance case. The best interests of a child in the UK is still a primary consideration: see paragraph GEN.3.3 Appendix FM.

36. The multiplicity of rules, policies and tautological statutory provisions complicate what should be a careful, but straightforward, evaluative assessment of where a fair balance should be struck between the right to family life of an individual and the due weight to be given to the public interest in maintaining an effective system of immigration control.

37. The evidence shows that the appellant me the requirements of Appendix FM for entry clearance as a spouse. The fact that the appellant overstayed and used deception would normally not lead to mandatory refusal because this is a family life application under Appendix FM. However, the respondent considered that there were aggravating factors that justified refusal under paragraph 320(11). We have found that those factors were sufficiently serious to meet the threshold contained in paragraph 320(11), but in deciding whether it was still appropriate to exercise discretion the respondent failed to consider relevant family life issues including the best interests of the child. Having concluded that the best interests of the child are to be brought up by both parents in the UK the crux of this assessment is whether the appellant's past immigration history is so poor that it outweighs the best interests of the child.

38. The effect of refusal is severe because it is likely to lead to the long-term separation of the appellant from his child with no prospect of being able to make a successful application for entry clearance in the future. The appellant's past immigration history is very poor. He expresses regret. He attempted to regularise his status by making a voluntary departure and then made an application for entry clearance through the proper channels. The overall scheme of the rules recognises the importance of family life, and in certain circumstances forgives past breaches of immigration law, whilst encouraging those who overstay to leave and make an application through the proper channels. We do not seek to diminish the appellant's past actions, but we conclude that the cumulative effect of the public interest considerations does not outweigh the family issues involved in this case. For these reasons, we conclude that the decision shows a lack of respect for the appellant's right to family life that does not strike a fair balance in the circumstances of this case (points (iv) & (v) of Lord Bingham's five stage approach in *Razgar*).

39. We conclude that the decision to refuse a human rights claim is unlawful under section 6 of the Human Rights Act 1998.

40. The appellant has been separated from his child during an important period when he needed to establish a parental bond. Given the length of time since the entry

clearance application was made we encourage the respondent to give effect to this decision as soon as possible.

**DECISION**

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is remade and the appeal ALLOWED on human rights grounds

Signed  Date 23 November 2017
Upper Tribunal Judge Canavan