**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/02787/2015

**THE IMMIGRATION ACTS**

| **Heard at Newport (Columbus House)** | **Decision & Reasons Promulgated** |
|---|---|
| **On 31 August 2017** | **On 19 September 2017** |

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**J A**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr I Richards, Senior Home Office Presenting Officer
For the Respondent: Mr T Shah of Taj Solicitors

**DECISION AND REASONS**

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

**Introduction**

2. The appellant is a citizen of Bangladesh who was born on [ ] 1985. He entered the United Kingdom on 17 November 2005 with entry clearance as a work permit holder valid until 9 November 2006. On 20 October 2006, he applied for further leave to remain as a student but this was

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refused on 16 November 2006. The appellant's leave then expired. On 9 January 2009, he was encountered working illegally and served with notice of removal. A subsequent application for leave was made on 4 March 2009 but, again, refused on 2 November 2009. A reconsideration was refused on 4 February 2013. He appealed against that decision but his appeal was dismissed on 8 July 2013 and he became appeal rights exhausted on 18 July 2013. He was subsequently detained in February 2014 and removal directions were set for 12 April 2014. These were cancelled after the appellant lodged a judicial review application on 8 April 2014. His claim was again considered and refused on 13 March 2014. He was released from detention on 7 May 2014. On 31 January 2014, he applied for leave based upon his private and family life but that was refused on 13 March 2014.

3. Most recently, the appellant applied for leave to remain again on the basis of his private and family life on 16 April 2015. That application was refused on 3 July 2015.

## The Appeal to the First-tier Tribunal

4. The appellant appealed to the First-tier Tribunal against the decision to refuse him leave based upon his private and family life. In a decision promulgated on 14 November 2016, Judge Coaster allowed the appellant's appeal under Art 8 outside the Immigration Rules (HC 395 as amended).

## The Appeal to the Upper Tribunal

5. The Secretary of State sought permission to appeal Judge Coaster's decision to the Upper Tribunal. First, the grounds argue that there were no "compelling circumstances" not covered by the Rules sufficient to allow the appellant's claim outside the Rules. Secondly, the judge had inadequately reasoned why the public interest in effective immigration control was outweighed by the appellant's circumstances.

6. On 31 March 2017, the First-tier Tribunal (Judge Keane) granted the Secretary of State permission to appeal.

## Discussion

7. Before me, Mr Richards who represented the Secretary of State relied upon the grounds but principally submitted that the judge had failed properly to consider the public interest in reaching her finding that the appellant's removal would be disproportionate.

8. The grounds first argue that the judge was wrong "to venture…outside the Rules" as there were no "compelling" or arguably "compelling" circumstances to justify it. This point is, in large measure, superseded by the Supreme Court's decisions in R (MM (Lebanon) and others) v SSHD [2017] UKSC 10 and R (Agyarko) and another v SSHD [2017] UKSC 11. There is no 'threshold' requirement that there must be an arguable case of "compelling circumstances" before a judge is required to engage in the

proportionality assessment under Art 8. The Rules remain a powerful statement of the public interest and, where an individual cannot meet the requirements of the Rules, that reflects the public interest in "effective immigration control" as is stated in s.117B(1) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002"). In those circumstances, as the Supreme Court held in Agyarko, the public interest will only be outweighed if there are "compelling circumstances" (see [57], [59] and [60]).

9. In this case, it is apparent that the judge concluded that the appellant could not succeed under the Immigration Rules because, as at the date of application, there were not "insurmountable obstacles" to his relationship with his wife continuing in Bangladesh. At para 29 the judge found that "the appellant does now" meet that requirement. That was clearly a statement about the present position, taking into account the fact that the appellant's wife was pregnant and that her mother was seriously ill with cancer. It is also clear that the judge reached her decision in para 38, having at paras 35-37 immediately preceding that, taken into account a number of matters relevant to the appellant's claim outside the Rules.

10. Although Mr Richards did not explicitly put the Secretary of State's case in this way, even if the grounds are interpreted as raising an argument based upon irrationality, I am not persuaded that the judge's findings were irrational. The two features which the judge found, in effect, to be "compelling" were features of the case that had arisen since the appellant's application and, therefore, post-dated the factors relevant to a consideration of the Rules. The appellant's wife was fifteen weeks pregnant at the date of the hearing (see paras 9 and 30). Further, the mother of the appellant's wife had been diagnosed with cancer and was undergoing chemotherapy (see paras 14 and 30). The pertinent reasoning of the judge is at paras 30-38 of her determination as follows:

> "30. Without question if the Appellant were removed to Bangladesh, Ms Haque in her state of pregnancy would find leaving the UK and her family to continue family life in Bangladesh very difficult. Becoming pregnant has not been without difficulty. Also her mother is seriously ill and receiving chemotherapy. The precarious immigration status of her husband has caused Ms Haque additional distress. However Ms Haque comes from a Bangladeshi family. Her parents were born in Bangladesh and I believe it is inevitable that she has an understanding of the culture of her parents and Bangladeshi society in the UK albeit she has little personal experience of culture and society in Bangladesh. I do not find that the prospect of learning to read and write Sylheti/Bengali a matter that cannot be overcome with reasonable effort. Nor do I accept that there is no support for the Appellant and his wife in Bangladesh as the Appellant's parents are supportive of the marriage and are happy that a baby is expected. There would therefore be some emotional family support for the Appellant and Ms Haque in Bangladesh. I accept however, that it would not be culturally acceptable for the Appellant to seek financial support from his married sisters.

31. I have no doubt that the prospect of permanent residence in Bangladesh would be a daunting prospect for Ms Haque. I so not hesitate to find that it would be a serious hardship for Ms Haque at the current time, as a pregnant women to leave the United Kingdom, her family and her life and culture in which she has been brought up. It is not a clear cut issue whether the Appellant would satisfy EX.1(b).

32. I find that the prospective birth of the Appellant's child in March 2017 and his wife's circumstances sufficiently compelling to justify consideration of Article 8 outside the Immigration Rules. If the Appellant is removed before the birth of his child, it would require Ms Haque to remain in the UK alone without her husband at a very important time in her life. The alternative is to relocate with him and to rely on the medical services of a third world country for her child's birth and have no support from her close family, particularly her older sisters, at a very special time in her life. This is a very harsh choice to present to a pregnant woman and particularly so for Ms Haque at a time when, additionally, she has a deep concern for her mother's health.

33. From the documentary evidence and the witness testimony I accept that the Appellant, having spent almost 11 years in the UK has integrated into UK society although I do not accept he has lost all ties to Bangladesh. That is an exaggeration.

34. I find that the Appellant's removal would be a grave interference with the Appellant's family and private life. It cannot be said that the Secretary of State's decision was unlawful.

35. I have regard to S117B. The Appellant speaks English. The Appellant would be able to work in the UK in the Indian restaurant trade where he has already some experience. He has been accepted into his wife's family who have to date appeared to willingly support him and his wife. No doubt they will expect the Appellant to support his wife and child if he were permitted to work. He would therefore also be able to make a contribution to UK society.

36. The Appellant claims that he has not had recourse to public funds but that is strictly speaking not the case because he has made substantial use of publicly funded NHS services. There was no evidence that he paid the NHS for such medical services. The Appellant is likely to make further use of the NHS given his current medical needs for a urological problem. However his wife and he will be able to work and that is their stated intention.

37. The Appellant's relationship with his wife and his private life in the UK was formed during the time that his immigration status was precarious. The Appellant stated that he preferred the culture in the UK. He does not want to return to Bangladesh where he would find it hard to adjust to life there after more than 10 years in the UK. A cynical view would be that his relationship with a British Citizen was fortuitous and strengthened or rather, founded his application for leave to remain. However from the various testimonies I have read, the Appellant is well able to make a contribution to society in the United Kingdom.

> 38. I have stepped back and looked at the evidence in the round with particular reference to the Appellant's wife, Ms Haque's current condition and the likelihood of being able to maintain family life together in Bangladesh. In this case, on these facts, I find by a very narrow margin, that the removal of the Appellant would be sufficiently serious that it would be disproportionate when weighed against the legitimate aid of maintaining effective immigration controls. The appeal is allowed."

11. Subject to the Secretary of State's submission in relation to the public interest, the judge clearly and unequivocally identified those factors as "sufficiently compelling" to outweigh the public interest. I am unpersuaded that her conclusion was irrational.

12. Further, I am unable to see the basis upon which the Secretary of State's second contention (principally relied upon by Mr Richards) can be sustained. The judge was plainly aware of the importance of the public interest. She set out the relevant law at paras 21-23, including setting out in full s.117B of the NIA Act 2002. At paras 35-36, she dealt with a number of issues under s.117B including that the appellant could speak English and was not reliant on benefits, although accessing NHS medical services. The judge specifically referred to the public interest in "maintaining effective immigration control" in the penultimate sentence of para 38; concluding that by a "very narrow margin" that public interest was outweighed by the appellant's circumstances, in particular the impact upon his wife who was fifteen weeks pregnant and her need to support her mother who was undergoing treatment for cancer. Mr Richards sought to defend the grounds on the basis that the judge's reference, ignoring the typographical errors, in para 39 to the "legitimate aid (*sic*) of maintaining effective immigration controls" was not a reference to the public interest. With respect, that is untenable. The public interest in "effective immigration control" is specifically spelt out in s.117B(1) of the NIA Act 2002 and is, in substance, a manifestation of the legitimate aims in Art 8.2 of the "economic well-being of the country" and "the prevention of disorder or crime". The judge plainly took that into account, having set out the appellant's immigration history earlier in her decision.

13. I, therefore, reject the Secretary of State's contention that the judge failed to take into account the public interest and failed to give adequate reasons why that public interest was outweighed by identifying "sufficiently compelling" circumstances based upon the pregnancy of the appellant's wife and her mother's ill-health. To the extent that the grounds implicitly assert the balancing exercise resulted in an irrational conclusion, I reject that contention also. Whilst perhaps not all judges would necessarily have reached the conclusion that Judge Coaster reached, it was in my judgment within the range of reasonable conclusions that a judge properly directing herself could reach.

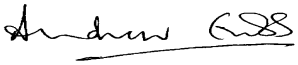
14. For these reasons, therefore, I reject the Secretary of State's grounds. The judge did not err in law in allowing the appellant's appeal under Art 8.

## Decision

15. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 did not involve the making of an error of law. That decision, therefore, stands.

16. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed



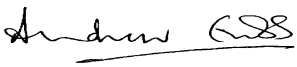
A Grubb
Judge of the Upper Tribunal

Date: 18 September 2017

## TO THE RESPONDENT
## FEE AWARD

Judge Coaster made no fee award as her decision was based upon new evidence. I see no basis to depart from that conclusion and none was put forward before me.

Signed



A Grubb
Judge of the Upper Tribunal

Date: 18 September 2017