Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/20912/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 July 2017	**On 4 October 2017**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MR RAZU AHMED
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Basith
For the Respondent: Mr Singh

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born in 1987. He appeals against a decision of the Respondent made on 20 May 2015 to refuse his application for leave to remain on the basis of his private and family life, in particular his marriage to a British citizen.

2. The Respondent found that the Appellant could not meet the Immigration Rules under paragraph 276ADE or Appendix FM. It was noted that the Appellant is in a genuine and subsisting relationship with his British partner who has lived in the UK all her life and is in employment here. However, although relocating to Bangladesh might cause a degree of

hardship for her there were not insurmountable obstacles preventing the relationship continuing in Bangladesh.

3. He appealed. Evidence submitted with the appeal included the birth certificate of their British citizen daughter born in January 2016.

4. Following a hearing at Hatton Cross on 12 August 2016 the appeal was dismissed on human rights grounds by First-tier Judge Zahed.

First tier hearing

5. Having accepted that the relationship is genuine and subsisting (at para 8) and having noted a summary of the oral evidence of the Appellant and his wife [10, 11], his analysis is at [12] to [18].

6. He found that financially the Appellant and his wife are dependant on his wife's family [12] and that '*this support can be replicated in Bangladesh by the Appellant's and his wife's family'*.

7. At [13] he placed little weight on a relationship formed with a qualifying partner that was established when he was in the UK unlawfully. It was noted that he entered the UK as a Tier 4 Student in January 2010 with leave until May 2013 which was extended until December 2014. However, as he had not been studying that leave was curtailed to December 2013 since when he had overstayed.

8. He found also that it was while he was here unlawfully he met and formed a relationship with his British partner, that his partner knew of his precarious status and notwithstanding that chose to marry [14]. Further, that they chose to have a baby knowing that the Appellant's status was precarious [15].

9. The judge gave little weight to the Appellant's private life while his status was precarious [16].

10. Dealing with their baby daughter (at [17]) he considered whether it would be reasonable for the child to leave the UK. He stated: '*Firstly the child is not being removed it is a British child whose mother is British. Thus the child will only leave if the mother leaves with the child and they live as a family unit. I find that the baby was born less than a year ago and thus will be entirely dependent on her mother, will not have formed any relationships outside her family. I find given this finding that it would be reasonable to expect the child to go to Bangladesh with her mother*.'

11. The judge concluded (at [18]) that the public interest in removing the Appellant outweighs the family life that he created whilst being unlawfully in the UK.

12. The Appellant sought permission to appeal which was granted on 13 June 2017.

Error of law hearing

13. At the error of law hearing before me Mr Singh agreed with Mr Basith that the First Tier decision showed material error of law such that it had to be set aside. It suffices to note the following. The judge gave inadequate, if any, consideration to paragraph 276 ADE, Appendix FM EX1 and 2, and the best interests of the Appellant's child who is a British citizen and whose maternal family are all present and settled here.

14. Having, by consent, set aside the decision Mr Basith indicated that he did not intend to lead further evidence. Both representatives made brief submissions. Mr Singh submitted that the child's British citizenship was not a trump card. Exceptional circumstances such as poor immigration history could count against the Appellant. Also, the family would not be forced out of the UK. There was nothing to stop the Appellant seeking entry clearance. Any separation from his child might be temporary.

15. Mr Basith's submission, in summary, was that it would not be reasonable to expect the Appellant's wife to go and live in Bangladesh. She was born in the UK, had lived her entire life here, her family are here as is her work. She would have no one in Bangladesh. As for the child she would not be able to exercise her rights as a British citizen were she to live in Bangladesh. She would also lose out in her relationships she has in the UK with her maternal family, who are all present and settled here. If the mother elected not to leave but to remain here with the baby the Appellant would not be able to apply for entry clearance due to the income threshold requirement and her having to look after the baby full time.

Consideration

16. The only right of appeal is against the refusal of a human rights appeal (s82 (1)(b) of the 2002 Act). The only ground of appeal is that the decision is unlawful under s6 of the Human Rights Act 1998 (see s84 (2)). The Respondent's decision is deemed to be a refusal of a human rights claim. In such a case the reasons for refusal focus on the immigration rules even though the appeal is in relation to article 8 only.

17. I must apply the **Razgar**-structured assessment (**R (Razgar v SSHD [2004] UKHL 27).**

18. The first issue is family and private life. There is family life between the Appellant and his wife who he married in November 2014. They have a child, a British citizen, who was born in January 2016. Clearly there is

family life with their child. Ms S R, his wife, is aged twenty seven and is a British citizen. She has no children by any other relationship.

19. The Appellant has been in the UK since 2010. His leave as a Tier 4 (General) Student was curtailed to expire in December 2013 because he failed to enrol on his course. An appeal was dismissed against that decision and all appeal rights were exhausted in June 2014. There is nothing before me to indicate that in his time here he has established any significant private life.

20. Ms R's position appears to be that she would not wish to leave the UK if her husband was removed but to remain here with their child. The interference with family life would thus be between the Appellant and his wife and child. Such would be of sufficient gravity to engage article 8 (1).

21. The third and fourth **Razgar** questions focus attention on the public interest (is interference in accordance with the law/if so is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of society…)

22. I start with the statutory public interest considerations in s117B of the 2002 Act. With regard to s117B (1), the Tribunal is required to give appropriate weight to whether a person meets the provisions of the immigration rules when deciding on what is in the public interest. Appropriate weight in this context will usually mean considerable weight because Parliament has entrusted the making of the immigration rules to the SSHD (see para 36-53 of **Hesham Ali (Iraq) v SSHD [2016] UKSC 60**). If the Appellant meets the requirements of the rules, then the public interest in expelling the Appellant must be very low because UK immigration policy permits those who meet the requirements of the rules to stay. With regard to s117B(2) to (6), insofar as they are reflected in the provisions of the rules, they will be wrapped up in a consideration of s117B(1). Sections 117B(2) to (5) may increase the weight to be given to the public interest. Section 117B(6) may reduce it.

23. Whether in terms of Razgar third and fourth questions or of Part 5 of the rules the ultimate question is proportionality and the balancing exercise.

24. The Respondent in the refusal letter considered that the couple would not face *'insurmountable obstacles'* in family life continuing outside the UK. I must now consider the additional fact that the couple have a British citizen child.

25. I first of all consider the best interests of the child. The best interests of a child are an integral part of the proportionality assessment. In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration, and the child's best interests do not of themselves have the status of the paramount consideration. Further, although the best interests of a child can be

outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant.

26. In assessing this child's best interests significant weight must be given to the fact that the child is a British citizen and as such a qualifying child for the purposes of s117B(6) of the Nationality, Immigration and Asylum Act 2002 which provides that the public interest does not require the person's removal where they have a genuine and subsisting parental relationship with a qualifying child (which is not in dispute) and '(6) *it would not be reasonable to expect the child to leave the UK'*. The same wording is contained in EX 1 (cc) (ii) of Appendix FM.

27. Being a British citizen the child has rights which she will not be able to exercise if she moves to another country. She will lose the advantages of growing up and being educated in her own country, her own culture and her own language. However nationality is not a trump card. The tribunal is required to take into consideration the full circumstances. In this case the countervailing circumstances are the need to maintain firm and fair immigration control, coupled with the Appellant's poor immigration history and the fact that his status was unlawful when family life was created. However, it is important to emphasise that the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.

28. In this case the best interests of the child must be to live in family wherever they are located. It may well be that her best interests are for such to be as a family in the UK. However, the child, born in January 2016, is very young. She is not yet in education. It cannot be said that her interests have any social or cultural or religious dimension separate from her parents. Nor can it be said that at such a young age there is any great strength in her relationships with extended family members. It is not indicated that she has any health issues. The focus of her life will be on her family. I can see no significant disruption to her going with her parents to live in Bangladesh and that at such a young age she will be able to adapt to life there, including learn the language. I see no reason why her emotional needs and the stability and continuity of her care arrangements cannot continue there.

29. As indicated the child, in the best interests assessment, is not to blame for her father's immigration misconduct. However it is not blaming the child to say that the conduct of the father should weigh in the scales when the general public interest in effective immigration control is under consideration. The principle that the sins of the father should not be visited upon the children is not intended to lessen the importance of immigration control or to restrict what the court can consider when having regard to that matter. As indicated the Appellant has remained unlawfully since 2014.

30. I conclude that there is nothing intrinsically illogical in the notion that whilst the child's best interests may be for her to stay, on the evidence

before me, it is not unreasonable to expect her to go (see **MA (Pakistan) and Ors, R (on the application of) v Upper Tribunal [2016] EWCA Civ 705)**(at [54]).

31. The mother's position is that she does not wish to go to Bangladesh. She was born in the UK, has lived her whole life here having only visited Bangladesh once for a wedding. She has her mother, siblings and extended family here. She has no support network or family in Bangladesh. She worked in retail until she went on maternity leave. She along with others in the family had financially supported them. She would not be able to get work in Bangladesh. They would not be able to support their child.

32. Ms R did not give evidence before me. Even if her claims to have no connection with Bangladesh are true, I do not see there to be insurmountable obstacles to family life continuing in Bangladesh. The Appellant is still a young man. He has spent the vast majority of his life in Bangladesh. Having come here to study he clearly speaks English as well as Bengali. Although it is suggested in his statement that ill health stropped him studying there is no evidence before me that he currently has any health problems. I can see no reason why, in these circumstances, he would not be able to get work sufficient to provide for his family.

33. Ms R chose to marry the Appellant and have their child despite knowing he had no lawful status here. It may well be that at least initially she might find it difficult to adjust to a country whose conditions and culture she is unfamiliar with. It may well be that she would miss the practical and emotional support of her extended family here. However, I do not see such problems of readjustment to amount to the '*very significant difficulties*' which could not be overcome or would entail very serious hardship (EX.2). I see no reason why she could not easily keep in touch with her family here by the usual means. In his statement the Appellant says he has no one to rely on in Bangladesh as his father is in Saudi Arabia and his elderly mother is in Bangladesh. He, too, did not give evidence before me. Even if his family circumstances are as claimed, it is unclear why he cannot rely on himself to support his family through work. It does not appear that he was financially independent in the UK but was largely dependent on his wife's family. There seems no reason why they could not continue to give financial support as necessary.

34. He cannot satisfy paragraph 276 ADE (vi). He came here on a temporary basis having, as indicated spent almost all his life in Bangladesh. He speaks Bengali. He has no health problems. He can support himself and his family. He comes nowhere near to showing '*very significant obstacles*' to his integration there.

35. Further, on s117 it appears that he speaks English (s117 (2)); but is not financially independent (s117 (3)). I can give little weight to any private life and to the relationship formed with a qualifying partner established at a

time when he was in the UK unlawfully (s117 (4)); also to any private life established at a time when his status was precarious (s117 (5)).

36. I conclude that the Appellant cannot satisfy the Immigration Rules. Such does not assist him in the assessment under Article 8.

37. As Mr Singh pointed out Ms R and the child are not being forced out of the UK. They are entitled to remain or can chose to go and remain as a family. Such no doubt would be a difficult choice. However, it is their choice just as it was their choice to form a relationship, marry and have a child in the knowledge that the Appellant's status here was first precarious and then unlawful. There is nothing to stop the Appellant making an entry clearance application. No up-to-date information was put before me in respect of the maintenance requirements and it is not for me to speculate.

38. I do not see there to be any exceptional or compelling circumstances in this case.

39. In seeking to perform the balancing exercise I conclude for the reasons given that removal is not disproportionate to the public interest.

The appeal fails.

Decision

The appeal is dismissed.

No anonymity direction made.

Signed

Upper Tribunal Judge Conway