



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/01697/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 2 March 2018**

**Decision & Reasons Promulgated
On 26 March 2018**

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**AZIZ [A]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M K Mustafa, Solicitor, Kalam Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Bangladesh, challenges the decision of First-tier Tribunal (FtT) Judge Telford sent on 26 May 2017 dismissing his appeal against the decision made by the respondent on 16 December 2015 refusing him entry clearance as a partner under paragraph EC-P.1.1 of Appendix FM of the Immigration Rules. The ECO decision stated that the appellant was also being refused under S-EC.2.5(a).
2. I heard concise submissions from both representatives.

3. The appellant advanced two grounds, the FtT judge being said to have erred firstly in dealing with the issue of suitability and secondly in assessing the issue of whether the appellant had shown he was in a genuine and subsisting relationship.
4. I find both grounds made out.
5. So far as concerns the first ground, it is clear that the ECO was wrong to seek to refuse the appellant under S-EC.2.5(a) as it only applies to persons who have committed offences. It is common ground that the appellant has not committed any offence. Mr Duffy sought to argue that this error did not affect the judge's treatment of the suitability issue because the judge disregarded S-EC.2.5(a) and instead applied paragraph 320(ii) which was the applicable Rule addressing the driving concern of the ECO which was the appellant's poor immigration history.
6. There are two difficulties with the respondent's attempt to defend the judge's application of paragraph 320(ii). The first is that the judge nowhere explains his reasons for deciding to apply a general rule of refusal which the respondent had not invoked. The judge's assertion at paragraph 19 that "[The discretion exercised by the respondent in regard to paragraph 320(ii) was correctly applied]" is misplaced. The respondent had not exercised this at all. Secondly paragraph 320(ii) is a rule that imports a discretion to be applied by Entry Clearance Officers by reference to published Guidance which requires a consideration in the round of all relevant factors, including family life in the UK. As I will go on to explain, it cannot be said that the judge's application of paragraph 320(ii) reflected an adequately conducted balancing exercise.
7. As regards the second ground, its gist was that the judge's treatment of the issue of whether the appellant had a genuine and subsisting marriage, wrongly focused on the historic situation to the neglect of the issue of (what the reported case of **GA ("Subsisting" marriage) Ghana* [2006] UKAIT 00046** referred to as) "the parties' present relationship and future intentions". In one respect, I am with Mr Duffy on this issue. It was clearly open to the judge to treat the history of the relationship as relevant to the question of whether at the date of the hearing the appellant was in a subsisting relationship. However, I agree with Mr Mustafa that the judge's treatment of the parties' present relationship and future intentions is defective. Although the judge correctly takes into account the fact that the couple now have a child (born in February 2017), the judge nowhere explores the nature of the appellant's wife's attitude to their relationship now that they have a child. The judge appears to regard the appellant's "fathering" as of no significance at all - indeed at paragraph 24 he analyses his family life purely in terms of his relationship with his wife, making no mention of his child. Further at paragraph 14 the judge resolves his inquiry into the best interests of the child by concluding that "parenthood and fathering with the mother as a couple can continue as it is or in Bangladesh". The child is a British citizen and it is common ground

that it is not reasonable to expect a British citizen child to leave the UK. If the judge at paragraph 14 meant to say that one viable alternative was the mother and child living in the UK without the appellant, then that required more by way of reasoning as to why that would be either in the child's best interests or proportionate. There were witness statements from the appellant and his wife that mentioned the significance of the child's arrival to their relationship. The spouse relied on her witness statement in evidence. The judge should have addressed this evidence and reached an assessment of it and then factored that into his decision on whether there was presently a genuine and subsisting relationship. To be fair to the judge, he may have ignored this evidence on the basis that the appellant has not seen his child, but physical contact is not necessarily determinative of the appellant's feelings about the child and about the couple's relationship now that they have a child.

8. For the above reasons I conclude that the judge materially erred in law and his decision is to be set aside. Both parties agreed with me that the most appropriate course was to remit the case to the FtT for a hearing de novo.
9. At the next hearing it is inevitable that the FtT will face the dilemma of whether to apply paragraph 320(ii) notwithstanding that the discretion it contains has not been exercised by the ECO. On the other hand, as a result of the proceedings so far, it will be entirely clear to the appellant that he will need to prepare to address the paragraph 320(ii) issue and make submissions as to why it should not be applied by the FtT judge or, if applied, not applied adversely to the appellant.

10. For the above reasons:

The decision of the FtT judge is set aside for material error of law.

The case is remitted to the FtT (not before Judge Telford).

No anonymity direction is made.

Signed

Date: 22 March 2018



Dr H H Storey
Judge of the Upper Tribunal