



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02763/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 4 April 2018

Promulgated

On 11 April 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

NAZRUL ISLAM

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr I Khan, Counsel, instructed by KC Solicitors

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Brewer (the judge), promulgated on 12 June 2017, in which he dismissed the appellant's appeal against the respondent's decision dated 22 December 2015 to refuse his human rights claim made in the form of an application for entry clearance to join his spouse under Appendix-FM of the immigration rules.

Factual Background

2. The appellant is a national of Bangladesh, date of birth 5 January 1987. He has a somewhat checkered immigration history. According

to the Reasons for Refusal Letter he entered the UK on 2002 without unlawfully. In 2007 he made an application for leave to remain which was refused. He did not return to Bangladesh after this refusal but submitted further applications for leave to remain, all of which were refused. He underwent a religious marriage ceremony with his partner, Ms Jakia Begum, in 2012 and they were legally married in 2014. The appellant voluntarily left the UK on 12 November 2015 having resided in the UK for approximately 13 years without permission.

3. The appellant made an online application for entry clearance under Appendix FM to join his partner. The respondent refused the application under paragraph 320(11) of the immigration rules on the basis of the appellant's previous illegal entry and unlawful residence, and because it was said that he made frivolous applications and undertook fertility treatment in respect of which he was not entitled. The respondent additionally found that the appellant failed to provide a suitable English language certificate pursuant to E-ECP.4.1. of Appendix FM.
4. The respondent did not refuse the application under any of the other requirements of Appendix FM or Appendix FM-SE. The respondent did not take issue with the appellant's relationship with his partner or the financial requirements necessary for a grant of leave to enter.

The decision of the First-tier Tribunal

5. The judge found that the refusal pursuant to paragraph 320(11) was not made out. It is not necessary for me to dwell on this finding as the respondent did not seek to challenge it by way of a cross-appeal. At the 'error of law' hearing the Presenting Officer confirmed that there was no challenge to the judge's paragraph 320 (11) finding. I need only add that the judge gave cogent and clear reasons for concluding that the respondent failed to identify aggravating features, as required by paragraph 320 (11), and that his conclusion was one rationally open to him for the reasons given.
6. The judge also found that the appellant had provided the requisite English Language certificate. Once again, I need not consider this finding in depth given that there was no cross-appeal against it. Once again, the Presenting Officer at the 'error of law' hearing confirmed that the judge was entitled to find that the requirements of E-ECP.4.1 were met and that there was no challenge to this aspect of the judge's decision.
7. Having upheld the appeal in respect of the only two bases for refusing entry clearance, the judge then proceeded to consider article 8 outside of the immigration rules. The judge set out the 5-stage approach to assessment of article 8 claims established in Razgar [2004] UKHL 27 and referred to a number of authorities giving guidance on the consideration of article 8 appeals outside the

immigration rules, including Agyarko [2017] UKSC 11. At [44] the judge noted that there was no suggestion from the appellant's partner of the existence of any "exceptional circumstances" preventing her from joining her husband in Bangladesh. In these circumstances the judge did not consider that there were any "exceptional circumstances" warranting a grant of leave to remain outside the immigration rules. The judge therefore dismissed the appeal on the basis that the respondent's decision was not incompatible with the appellants' rights under article 8.

The grounds of appeal and the error of law hearing

8. The grounds content that the starting point for the judge's consideration of article 8 should have been the immigration rules. The fact that the appellant met all the requirements for entry clearance under the immigration rules was a highly relevant consideration, one that was not considered by the judge. In granting permission to appeal Judge of the First-tier Tribunal I D Boyes stated,

The Judge has purportedly allowed the appeal as not being in accordance with the rules and found for the appellant in relation to the immigration rule specific aspects but refused the overall appeal on Article 8 grounds. Permission is granted. It is arguable that there is a serious mistake in the conclusions and outcome as promulgated.

9. At the error of law hearing the Presenting Officer accepted that there had been an error of law in that the judge did not appear to take into account the appellant's otherwise unchallenged compliance with the requirements for entry clearance under Appendix FM and Appendix FM-SE of the immigration rules. It was submitted however that this error was not material as the judge went on to consider article 8 outside of the immigration rules and was entitled to find that there were no compelling circumstances preventing the relationship from continuing in Bangladesh.

Discussion

10. The refusal of entry clearance, which amounted to a refusal of a human rights claim, did not raise any issue with any other aspect of the application other than the refusal under paragraph 320 (11) and the issue relating to the English language certificate. It was accepted by the Presenting Officer at the 'error of law' hearing that the requirements for entry clearance were met. This means that the judge was satisfied that all material requirements contained in Appendix FM and Appendix FM-SE were met. This certainly appears to be the basis upon which the judge considered the appeal. The fact that the requirements for entry clearance were met was undoubtedly a highly significant consideration when determining an article 8 appeal, and in particular, the proportionality of a refusal of entry clearance.

11. It appears, although it is not entirely clear, that the judge engaged in a proportionality assessment at [44]. In this paragraph the judge considered the evidence from the appellant's partner that she would encounter some difficulty in returning to her family in Bangladesh because she was a divorced Muslim, but found that there was no real evidence as to why she could not join her husband in Bangladesh where he resided. The judge found that there were no language or cultural barriers to her return. The judge concluded that there were no exceptional circumstances warranting a grant of permission outside the rules. Nowhere in [44] does the judge consider the consequences of the appellant meeting the requirements for entry clearance under Appendix FM. Given that the appellant did appear to meet all the requirements for entry clearance, this should have been a very significant factor in the proportionality assessment. The failure to consider the appellant's compliance with the immigration rules when undertaking the proportionality assessment constitutes a material legal error.

12. Nor is it clear to me why the judge proceeded to consider article 8 outside the immigration rules when the immigration rules themselves reflected the balance to be struck between the right to respect for family life and the relevant public interest factors. Gen.1.1., which can be found under the heading 'Purpose' at the beginning of Appendix FM, reads,

This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (and the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of these rules). It sets out the requirements to be met and, in considering applications under this route, it reflects 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 aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others (and in doing so also reflects the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002).

13. The Secretary of State considers that the requirements of Appendix FM strike a fair balance between family life and general public interest considerations. If the requirements of Appendix FM are met, a fair balance will, according to the Secretary of State, have been achieved. The term 'fair balance' can only reasonably correspond to the concept of proportionality. If a person has therefore met all the requirements for a grant of leave under Appendix FM, and there is no other basis for refusing the application under the general grounds of refusal (paragraph 320), then that is, in the overwhelming majority of cases, determinative of the proportionality assessment. The judge's failure to even consider the consequences of the appellant's compliance with

the requirements of Appendix FM unarguably constitutes a material error of law.

14. Having identified a material legal error I indicated that I would proceed to remake the decision and I invited the Presenting Officer to make any further submissions. None were made.
15. It was not in dispute that the respondent's decision did not challenge any aspect of Appendix FM other than the absence of the required English language certificate. There was no cross-appeal to the judge's conclusions that the refusal of entry clearance under paragraph 320 (11) was not made out, and that the required English language certificate had in fact been provided. It was therefore accepted by the Presenting Officer that the requirements of Appendix FM and Appendix FM-SE were met. The appellant therefore meets the requirements for entry clearance under Appendix FM. Given the purpose of Appendix FM, as outlined in GEN.1.1, the appellant's compliance with the requirements of Appendix FM is a highly significant factor in determining whether the refusal of entry clearance is proportionate. I fully take into account the length of time that the appellant resided illegally in the UK, but I note that the Suitability requirements of Appendix FM have been met, that the respondent has not made out the requirements of paragraph 320 (11), and that there has been no reliance placed on any of the other general grounds for refusal. In these circumstances I find that the refusal of entry clearance constitutes a disproportionate interference with article 8 and I allow the appeal.

Notice of Decision

The First-tier Tribunal made a material error of law. I set aside the decision of the First-tier Tribunal and remake it allowing the appeal



5 April 2018

Signed
Upper Tribunal Judge Blum

Date