IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004600
First-tier Tribunal No: HU/50372/2022
IA/00571/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 March 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Musammat Opi Begum — Appellant
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department — Respondent

Representation:
For the Appellant: Mr A Islam, of Counsel.
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 27 January 2023

DECISION AND REASONS

1. The appellant, a national of Bangladesh born on 8 August 1987, appeals against a decision of Judge of the First-tier Tribunal Pears (hereafter the "judge") promulgated on 28 July 2022 following a hearing on 25 July 2022 (held via CVP) by which the judge dismissed her appeal on human rights grounds against a decision of the respondent of 12 January 2022 to refuse her application of 12 March 2021 for leave to remain in the United Kingdom on the basis of her family and private life.

2. The judge also purported to dismiss the appellant's appeal under the Immigration Rules. Although the judge correctly considered whether the appellant satisfied the relevant requirements under the Immigration Rules in order to inform his decision on her Article 8 claim outside the Immigration Rules, he did not have jurisdiction to allow or dismiss the appeal under the Immigration Rules. This is because s.15 of the Immigration Act 2014 abolished with effect from 20 October 2014 the right of appeal against a decision on the ground that the decision is not in accordance with the Immigration Rules and the

jurisdiction of a judge of the First-tier Tribunal to allow or dismiss an appeal under the Immigration Rules.

3. Nothing turns upon this issue in the appeal before me. I merely mention it for the record.

4. The appellant's family life claim was based on her marriage to Mohammed Uzzal Hussain (the "sponsor") who is also a national of Bangladesh, born on 26 May 1975, with indefinite leave to remain. The appellant's representatives incorrectly stated that he is a British citizen (para 2 of the judge's decision). The appellant and the sponsor started to live together in December 2016. They had a Muslim wedding in 2017. They registered it on 13 July 2021. The appellant had previously married Mohammed Abdul Kalam, a British citizen, in 2006 in Bangladesh. That marriage was dissolved on 17th March 2017.

5. The appellant's private life claim was based on private life established since she entered the United Kingdom on 2 March 2013 with leave to enter as a visitor, valid until 14th August 2013. Before her leave expired, she applied for leave based on her family/private life which was refused on 23 October 2013. She appealed. Her appeal was dismissed and she exhausted her appeal rights on 30 May 2014. In January 2019 she applied again for leave to remain. The application was refused and she then made her current application on 12 March 2021. I have taken this information from para 3 of the judge's decision.

6. At para 3 of his decision, the judge noted that the appellant was therefore in the United Kingdom unlawfully from 2014 and that, whilst she and the sponsor started to live together in December 2016, no application was made to regularise her stay until January 2019.

The judge's decision

7. In summarising the respondent's reasons for refusing the appellant's application, the judge observed (at para 6) that the Secretary of State's decision letter raised the issue of the appellant returning to Bangladesh either alone or with her husband in order to make the appropriate application for leave from there. The judge observed that one would therefore have expected her in her evidence to explain why that was not possible.

8. The judge heard oral evidence from the appellant, the sponsor, Mr Ravel, Miss Miah and Ms Shirin.

9. The judge accepted that the appellant had a genuine and subsisting relationship with the sponsor who is settled in the United Kingdom (para 31).

10. However, the judge had difficulty with the oral evidence of the appellant and the sponsor, saying, at para 32:

> "32. However I found neither the Appellant nor her husband were willing to answer problematical questions. I was far from satisfied that I was being told the truth about their present connection with Bangladesh – on their case both the families of the Appellant and her husband had seemingly lost all familial contact with anyone in Bangladesh. Neither the Appellant nor her husband had made an inquiry about jobs in Bangladesh or inquiries about housing, temporary or otherwise. The Appellant had had a job in Bangladesh and I see no evidence to show that her husband would not be able to get one there. The Appellant had lived until 2013 in Bangladesh and I simply fail to accept that her friends and connections made until 2013 have all disappeared. Further I do not accept that her husband would go to Bangladesh for a month to see friends without having telephoned or emailed and ascertained that there were friends to visit. In relation to the fertility treatment the Appellant commenced it only in 2020 when

her immigration status was still unresolved and she was in the UK unlawfully. There is no medical evidence that a pause in the treatment would cause difficulties and there is no evidence that fertility treatment would not be available in Bangladesh. In fact what the evidence showed was that the Appellant and her husband had decided they were not going to go to Bangladesh but had not begun to show on the evidence that there were insurmountable obstacles as defined by EX.2 to family life continuing in Bangladesh. Further I accept what the refusal letter says in this regard."

11. The judge found (para 33) that the appellant had failed to show that there are very significant obstacles to her integration into Bangladesh whether as a woman returning without her husband or as a woman with her husband. In relation to the former, his reasons were that the appellant had lived in Bangladesh until 2013 although her parents were alive then; she had had a job there; she has a sister there; and she had not shown on any evidence that as a unaccompanied but married woman she could not return and integrate into Bangladesh "*in say, one of the larger urban communities*".

12. At paras 34-35, the judge considered whether the appellant should have to return to Bangladesh to make an entry clearance application from there. Paras 34-35 read:

> "34. I then turn to the issue of whether the Appellant should have to return to Bangladesh to make an application from there. It seems to me to be a matter of choice whether she goes alone or with her husband. He might not want to go to Bangladesh for a short time but I am afraid I simply do not accept that a Tandoori chef with his experience would not be able to get another job in the UK if he returned to Bangladesh for a short time whilst his wife applied for a visa; I note that he had not, it seems, made any inquiry of his current employer who he claimed to have worked for 10 years what the position might be, if he went for a period to Bangladesh.
>
> 35. The Appellant despite the Chikwamba point being raised [in the refusal letter] has failed to address the public interest points satisfactorily. It seems to me that given modern modes of contact, a temporary separation whilst an application was made would not necessarily engage Article 8 and as *[sic]* I have found there is not a significant impediment to her husband accompanying her for a short period. The Appellant has not shown on the evidence that an application made from Bangladesh would not be granted and in any event I find that it would be. There is a public interest in the Appellant being required to leave because she came as a visitor, remained unlawfully for some years and only sought to regularise her position in 2019. I find that in those circumstance *[sic]* the public interest is strong."

13. The judge considered proportionality at paras 36-37 and found at para 38, that the decision to remove the appellant would be proportionate "*so that she can make an application from Bangladesh*". At para 39, the judge said that, even ignoring Chikwamba, a decision to remove the appellant permanently would not be disproportionate. Paras 36-39 read:

> "36. I turn now to the issue of proportionality. I accept that the Appellant has a genuine and subsisting relationship with her husband who is settled in the UK. I also accept that she has family in the UK to whom she is attached. However as I have said her husband could go to Bangladesh and her family could maintain contact with her by visits and modern forms of communication. She speaks English and is financially independent. She has no criminal convictions.
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> 37. On the other hand I have already decided that the public interest is strong in favour of removing her. Her immigration status has always been precarious and from 2014 was illegal. Her relationship with her husband was established and

developed whilst she was in the UK illegally and he knew her lack of status from the beginning. Little weight is therefore to be attached either to her private life or family life with her husband.

38. I find therefore that the decision to remove her would be proportionate so that she can make an application from Bangladesh.

39. Finally I would say that looking at Article 8 outside the rules and ignoring the Chikwamba point I find that a decision to remove the Appellant permanently would not be disproportionate. The Appellant would be returning to a country where she lived until 2013, her husband who comes from Bangladesh could return with her. She and he could obtain jobs and accommodation and given the factors out *[sic]* in relation to section 117B the decision would be proportionate."

The grounds

14. Permission was granted by Judge of the First-tier Tribunal I D Boyes only on ground 1 and refused on grounds 2 and 3 which were set out at paras 13-19 of the grounds.

15. I now summarise ground 1, breaking it down into the following separate sub-grounds, for ease of reference:

(i) Ground 1(a): The judge erred at para 26 in referring to and relying upon Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC) in reaching his finding at para 35 that the public interest in requiring the appellant to leave the United Kingdom was strong, in that, he failed to distinguish the instant case from the facts in Younas. The Upper Tribunal's view in Younas that the public interest was strong in that case was reached on the facts. The appellant in Younas had entered the UK as a visitor while her real intention was to remain in the United Kingdom with her partner. The judge seemed to have taken Younas as laying down a principle that inevitably made it a strong public interest factor to require appellants to return to their home countries if they came to the United Kingdom as visitors, overstayed and then applied in-country for leave to remain as partners.

(ii) Ground 1(b): The judge failed to apply the following cases which explained the correct approach in assessing proportionality:

(x) EB (Kosovo) v SSHD [2008] UKHL 41 in which the House of Lords held at para 12: *"…it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal…"*

(y) Rajendran (s117B – family life) [2016] UKUT 138 (IAC) in which the Upper Tribunal explained that the factors listed in sections 117 A-D of the Nationality, Immigration and Asylum Act 2002 were only a starting point.

(iii) Ground 1(c): The judge erred at para 33 where he asked himself whether the appellant has shown that there are very significant obstacles in her integration into Bangladesh whereas the correct question was whether the refusal to grant leave would result in unjustifiably harsh consequences.

(iv) Ground 1(d): The judge erred at para 36 where he asked whether the appellant's spouse could go and live in Bangladesh whereas the correct question was whether in all of the circumstances it would be reasonable for him to follow her to Bangladesh.

The refused grounds – grounds 2 and 3

16. Grounds 2 and 3, in respect of which permission was refused, were, in summary, as follows:

> (i) Ground 2: The judge's finding at para 32 where he said "*I do not accept that her [the appellant's] husband would go to Bangladesh for a month to see friends without having telephoned or emailed and ascertained that there were friends to visit*" was irrational because there is nothing unusual for a person in his circumstances, having originally come to the UK from Bangladesh in 1992 and being still a citizen of Bangladesh, to visit Bangladesh, which he did in 2018 "*to, inter alia, try to see if any of his friends are still there and/or just to see the country."* Alternatively, the judge failed to give any or any adequate reasons for this finding.
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> (ii) Ground 3: The judge erred in failing to give any or any due weight to the following:
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> > (a) In relation to the appellant, that (inter alia) she used to live with her parents before she came to the UK but they are no longer alive and she would therefore be living alone for the first time in her life as a female in Bangladesh; her sister in Bangladesh married in 2005 and is living with her husband and his extended family; and the appellant has been undergoing fertility treatment which to date has cost her £9,305 and she is awaiting an operation in the next month in this regard.
> >
> > (b) In relation to the sponsor, that (inter alia) he has been living in the United Kingdom since 26 May 1992 having arrived as a minor at the age of 17 years; he was granted leave to remain and then indefinite leave to remain on the basis of his long residence; his mother died in 1995 and his father died in 2005; he does not have any family members in Bangladesh; he has only visited Bangladesh once, for one month in 2018, since coming to the United Kingdom; and he does not own any properties or house in Bangladesh.

17. In refusing permission on ground 3, Judge of the First-tier Tribunal Boyes said that ground 3 repeated ground 1.

18. Mr Islam incorporated grounds 2 and 3 into his skeleton argument submitted for the hearing, at para 5 (i)-(xi) of the skeleton argument.

19. At the commencement of the hearing, I reminded Mr Islam that the First-tier Tribunal had refused permission to appeal on grounds 2 and 3 and that he had not made an application to the Upper Tribunal to renew his application for permission on grounds 2 and 3. He explained that the reason for incorporating grounds 2 and 3 into the skeleton argument was because Judge Boyes had said that ground 3 was a repeat of ground 1 and he therefore thought that they overlapped.

20. However, the fact is that: (i) the appellant is not prejudiced by not relying upon any overlapping grounds; and (ii) to the extent that ground 3 goes beyond ground 1, she was refused permission and she did not make an application to renew her application for permission.

21. It follows that grounds 2 and 3 are not before me.

Submissions

22. Mr Islam informed me that ground 1 challenges the judge's finding at para 34 that it would be proportionate for the appellant to return to Bangladesh to make an application for entry clearance as well as his alternate finding at para 39 that, even leaving aside Chikwamba v SSHD [2008] UKHL 40, it would be proportionate to remove the appellant

permanently. He agreed that, if the challenge to the finding at para 34 failed, then it could not succeed against the finding at para 39.

23. Mr Islam relied upon his skeleton argument. He submitted that the judge asked himself two incorrect questions. Firstly, he erred in asking whether there were very significant obstacles to the appellant's reintegration in Bangladesh, in that, the correct question was whether the refusal would result in unjustifiably harsh consequences. Secondly, he erred in asking himself whether the sponsor could go and live in Bangladesh, in that, the correct question was whether it was reasonable for him to live in Bangladesh.

24. The judge erred in failing to distinguish Younas and failed to note that, as the appellant in Younas had come to the United Kingdom with leave as a visitor when her intention was to live in the United Kingdom, there was deception from the outset. There is no such finding of deception in the instant case.

25. Mr Tufan referred me to the fact that ground 1 does not mention EX.1 (b) which requires there to be insurmountable obstacles to family life continuing outside the United Kingdom. In the assessment of Article 8 outside the Immigration Rules, the question is whether the decision would result in unjustifiably harsh consequences. The judge clearly found that there would not be. Mr Tufan referred me to para 113 of Alam and another v SSHD [2023] EWCA Civ 30. He submitted that, in Younas, the Upper Tribunal said that it was for the individual to demonstrate that temporary removal would be disproportionate and that reliance upon Chikwamba did not obviate the need to address the s.117B factors. He also referred me to R (Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) (IJR) [2015] UKUT 00189 (IAC).

26. In response, Mr Islam submitted, in reliance upon Rajendran that the factors in s.117B were to exhaustive, that the claimant had never sought public funds and she is having medical treatment which the judge did not considered.

27. I reserved my decision.

ASSESSMENT

28. This is a case in which permission ought not to have been granted.

29. Dealing with ground 1(a), the attempt to distinguish Younas on the basis that there was deception in Younas, in that, the appellant in that case had entered the United Kingdom as a visitor whereas her intention was to live in the United Kingdom permanently amounts, in reality, no more than an attempt to reargue the case.

30. In any event, there is no reason to think that the judge was not alive to that distinction. At para 26 of his decision, he quoted from the decision in Younas, including where the Upper Tribunal specifically referred to the public interest in that case being strong in view of the fact that the real intention of the appellant in that case when she arrived in the United Kingdom was to remain in the United Kingdom with her partner. At paras 35 and 37 of his decision, the judge said, in finding that the public interest in the instant case was strong, as follows:

> "35. …There is a public interest in the Appellant being required to leave because she came as a visitor, remained unlawfully for some years and only sought to regularise her position in 2019. I find that in those circumstance *[sic]* the public interest is strong.
>
> 37. … Her immigration status has always been precarious and from 2014 was illegal. Her relationship with her husband was established and developed whilst she was in the UK illegally and he knew her lack of status from the beginning. Little weight is therefore to be attached either to her private life or family life with her husband."

31. There is no indication at all that the judge incorrectly decided that the public interest was strong in her case *because* she had had the intention of living in the United Kingdom permanently at the time of her arrival with leave as a visitor.

32. Ground 1(a) is therefore devoid of substance.

33. I turn to ground 1(b) and the reliance upon EB (Kosovo). Mr Tufan referred me to Chen. I noted that at para 34 of Chen, the Upper Tribunal referred to R (Kotecha and Das) v SSHD [2011] EWHC 2070 (Admin) in which Burnett J (as he then was) considered the judgment in Chikwamba and concluded, at para 48:

> "48. In suggesting that the course proposed by the Secretary of State [of requiring a claimant to make an application for entry clearance from his or her home country] would only 'comparatively rarely' be proportionate in a case involving children I do not understand Lord Brown to be laying down a legal test. Rather, he was expressing the expectation of the Committee that, having undertaken the careful evaluation explained on the same day in *EB (Kosovo),* the balance on proportionality would fall in favour of the individual in cases such as *Chikwamba.* Put differently, such cases would fall within the minority envisaged by the House of Lords in *Huang*, or more generally the exceptions referred to in the Strasbourg Court, in which article 8 would provide an obstacle to removal."

34. At para 35 of Chen, the Upper Tribunal stated that it was therefore misconceived to suggest, in reliance upon Chikwamba, that it is only rarely that it will be proportionate to expect a claimant to make an application for entry clearance from abroad *irrespective of his or her individual's circumstances,* noting that Lord Brown specifically said in Chikwamba (at para 42) that:

> "42. In an article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant".

35. Despite it being made clear in case-law, Younas and Chen being only two examples, that it was for an individual relying upon Chikwamba to produce evidence to show that temporary temptatioYounas and n for the purpose of making an entry clearance application is disproportionate and despite the fact that the decision letter in the instant case raised the issue, the judge noted (at para 6) that the appellant had not addressed why she could not return to Bangladesh either alone or with the sponsor in order to make an appropriate application for entry clearance from there and at para 34 that the sponsor had not made any enquiry of his current employer what the position might be if he went to Bangladesh for a period.

36. The judge was therefore wholly entitled to find at para 35 that there was not a significant impediment to the sponsor accompanying the appellant for a short period.

37. The judge was therefore wholly entitled to find that the appellant could return to Bangladesh either alone or with the sponsor for a short period in order to make an application for entry clearance. On that basis alone, the judge was wholly entitled to find that the decision was not disproportionate.

38. Ground 1(b) therefore simply ignores the fact that there was no evidence before the judge to show that it would be unreasonable for the sponsor to accompany the appellant to Bangladesh for the purpose of an application for entry clearance.

39. I therefore do not need to consider the judge's alternative finding at para 39 that it would not be disproportionate to remove the appellant permanently, although I should say that I cannot see any error given the limited evidence there was before the judge, in particular,

his finding at para 32 that there were no insurmountable obstacles to family life continuing in Bangladesh, taken together with para 32 where he said, inter alia, that he was far from satisfied that he was being told the truth about the appellant's and the sponsor's present connections with Bangladesh and that neither had made any enquiries about jobs or housing in Bangladesh.

40. Reliance upon Rajendran is of no assistance to the appellant in establishing that the judge erred in law. There is simply no reason to think that the judge was not aware that the factors in s.117A-B and D were not exhaustive.

41. Ground 1(b) is therefore also devoid of substance.

42. Ground 1(c) is misconceived. The judge followed the correct approach of considering, first, whether the appellant satisfied the relevant requirements under the Immigration Rules. It is axiomatic that if she did satisfy the relevant requirements under the Immigration Rules, this would be a weighty actor in her favour in carrying out the proportionality balancing exercise outside the Immigration Rules. That is the context in which the judge considered whether there would be very significant obstacles to appellant's reintegration in Bangladesh. After having considered whether the appellant satisfied the relevant requirements under the Immigration Rules at paras 31-35, the judge considered proportionality from para 36. That was the correct approach.

43. Ground 1(d) is not established for the reasons I have given in relation to grounds 1(a) and 1(b) above.

44. I have therefore concluded that the judge did not err in law. In addition, I reiterate that this is a case in which permission ought not to have been granted.

45. The appellant's appeal to the Upper Tribunal is therefore dismissed.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside.

The appellant's appeal to the Upper Tribunal is therefore dismissed.

Signed
Upper Tribunal Judge Gill Date: 3 February 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**