IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000470

First-tier Tribunal No: HU/54099/2022
IA/06194/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 4th June 2024

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

SULTANA NAHIMA CHOWDHURY
(NO ANONYMITY ORDER MADE)
Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Presenting Officer
For the Respondent: Mr Marfat, instructed on behalf of the respondent

Heard at Phoenix House (Bradford) on 22 April 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal(Judge Moran) (hereinafter referred to as the "FtTJ") who allowed the appeal against the decision made to refuse her application for leave to remain on human rights grounds in a decision promulgated on 21 January 2023. .

2. The First-tier Tribunal did not make an anonymity order and no grounds have been advanced on behalf of the appellant to make such an order.

3. Although the appellant in these proceedings is the Secretary of State, for convenience I will refer to the Secretary of State for the Home Department as the respondent and to the appellant before the FtT as "the appellant," thus reflecting their positions before the First-tier Tribunal.

The background:

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4. The background to the appeal is set out in the evidence and in the decision of the FtTJ.

5. Sultana Nahima Chowdhury (SC) is a Bangladeshi national. On 28th December 2021 she made an application for entry clearance to the UK on the basis of her marriage to her British partner Syed Shajid Ali (SA).

6. Her application was refused in a decision made on 7th June 2022. The reason for refusal was that she did not meet the eligibility requirements of the Rules as SA is not settled in the UK. Although he has been here for over 20 years he is only in the UK with limited leave.

7. The respondent went on to decide that there were no exceptional circumstances for granting leave outside these Rules. It was not disputed that there is an ongoing genuine and subsisting relationship, that SC meets the English language requirement and that the financial requirements are met. The FtTJ set out that the respondent's position at the hearing is that SC and SA can either wait until SC meets the Rules in order to live together in the UK or they could reasonably be expected to live together in Bangladesh.

8. As to the factual circumstances, the FtTJ sets out that SA came to the UK in April 1999 and has lived in the UK ever since. He came as the spouse of a British citizen, but they divorced in 2004. He married again in 2004 but then divorced again, in 2007. He tried to find a wife again after this but was unable to do so due to his lack of immigration status.

9. SA was granted limited leave to remain on 9th September 2019 for 30 months. This has since been renewed for another 30 months and is due to expire or be renewed in late 2024.

10. SA travelled to Bangladesh in October 2020 and married SC in an arranged marriage on 15th November 2020. Whilst in Bangladesh he stayed in a house that was rented by his wife and mother-in-law. He agreed in cross-examination that he could return and live there but the FtTJ recorded that he did not take the sponsor to be agreeing that he could do so without very serious difficulties.

11. SA explained that his parents are deceased and that the only relatives of his that attended the wedding were his maternal and paternal cousins' brothers and their families. He said that all his immediate family are in the UK. SA returned to the UK on 25th November 2020. He continues to work in a restaurant and has held the job now for over three years.

12. SC is currently living with her parents in Bangladesh. Given SC's age they are anxious to try to have children as soon as possible. SC is worried about being a childless married woman in Bangladesh due to the prejudice against such women. She has also been subjected to derogatory remarks since her visa application was refused.

13. The FtTJ recorded that the parties say it is not reasonable for them to live in Bangladesh for a number of reasons. These include; the amount of time that SA has been in the UK, that he is progressing towards settlement, there would be very serious hardship in Bangladesh as he could not find a job there and he would have to give up his employment in the UK .

14. They both say that the reasons SA could not find work in Bangladesh are due to the poor job prospects there generally, his age and his lack of experience in Bangladeshi work. SA added that he has a different mentality now that he has been in the UK for so long.

15. They also maintain that it is not realistic for SA to make regular or extended visits to Bangladesh due to his work commitments and the need to maintain an income that would meet the minimum income requirements.

16. SA said that when they married he was not aware that his immigration status would prevent SC meeting the Immigration Rules. He added that he has been financially supporting SC since the marriage and that they have not considered what they will do if the appeal fails. He accepted that he has not made any enquiries about employment in Bangladesh. He said he has never worked there as he was studying in Bangladesh before coming to the UK.

17. The FtTJ recorded that there is no dispute in this case that SC cannot meet the primary family life provisions in the Immigration Rules but that it is argued that the appeal should succeed outside these provisions of the Rules and that the requirements of GEN.3.2 are met, which state;

GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.'

18. The FtTJ also set out the provisions of section 117B of the NIAA 2002.

19. The FtTJ's findings of fact are set out between paragraphs 18-29 as follows:

> 20. I accept that there is family life between SA and SC and that the decision interferes with this to an extent potentially engaging Article 8. The issue is the proportionality of that interference.
>
> 21. Mr Marfat argued that it is anomalous that someone who has leave to remain on the basis of 20 years' long residence cannot sponsor a partner to come to the UK. He points out that some other categories of person with limited leave to remain are able to do so. He points out that SC meets all of the other requirements of the Rules meaning that the public interest considerations in s117B (2) and (3) do not operate against the appellant.
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> 22. He argues that it would be 'unjustifiably' harsh to refuse the application when there is such a reduced public interest operating against the appellant.
>
> 23. Harsh consequences can often be justified by the strength of the public interest pulling in the other direction. Where the public interest is not as strong it will be easier for the appellant to establish that the same consequences are not justifiable. In this case the normally strong public interest in immigration control is much

reduced because SC meets all of the other requirements of the Rules that are designed to protect the public interest. There are no other public interest considerations engaged apart from the need for immigration control.

24. The consequences of the decision for SA and SC are either that they conduct a long distance relationship for many years until SA has settled status or they choose to continue their family life in Bangladesh.

25. I am in no doubt that it would be unjustifiably harsh to expect them to conduct a long-distance relationship until SA has settled status in several years' time. This is particularly so where he cannot afford to make extended visits there. The more difficult question is whether it is unjustifiably harsh to expect them to continue their family life in Bangladesh rather than the UK.

26. I have to consider the potential effect on both SC and SA. It would be less harsh on SC for family life to continue in Bangladesh. She is used to living there and all her family reside there. The effect on SA would be more significant. He is used to living in the UK, has inevitably developed ties here given the time he has been here, has his more immediate family members here (albeit not parents or children) and is on the pathway to obtaining settled status. He has steady employment here that he would lose. His job prospects in Bangladesh are not likely to be as good. The consequences for SA therefore are very significant should he have to leave the UK.

27. Set against this is the fact that they either knew, or should have known, that when he entered a relationship with and married SC that she would not meet the Immigration Rules to enter the UK as his spouse and therefore that they may have to live together elsewhere if she could not obtain leave outside the Rules. To that extent their family life was precarious. He retains some family members in Bangladesh and is familiar with the language and culture despite his time away from the country. He has recently been there to marry. Whilst I accept without background country evidence that his job prospects are likely to be worse I have not accepted that they are so bad that they are likely to be destitute.

28. In other circumstances the consequences here may not be unjustifiably harsh. On the facts here however where there is such a reduced public interest I conclude that the decision does have unjustifiably harsh consequences. I conclude that the interference in family life is disproportionate bearing in mind the reduced strength of the public interest in this case.

29. It would be open for the respondent to limit the grant of leave to leave in line with SA's leave.

20. The FtTJ allowed the appeal.

The appeal before the Upper Tribunal:

21. The respondent sought permission to appeal and permission to appeal was granted by FtTJ Parkes on 21 February 2023 for the following reasons:

"The grounds argue that the Judge erred in the approach to article 8 when the burden is on the Appellant to show that it would be unreasonable to expect them to live together in Bangladesh. The Judge did not consider the Respondent's long standing policy and did not give adequate reasons for the findings made.

The Judge appears to have treated article 8 as a stand-alone exercise in viewing the public interest as being significantly reduced, almost to the near-miss decision. It is

not clear on what basis it was found that it would be unreasonable for the Appellant and Sponsor to pursue family life abroad. The grounds are arguable.

22. The written grounds advanced on behalf of the respondent state as follows:

(1) The judge fails to identify the applicable standard of proof and it is argued that this is a material error when there is a tendency to simply broadly accept matters as opposed to making clear findings of fact.

(2) The Judge fails to follow the correct approach at [20] when appearing to hold that Article 8 is engaged and there is an interference in Article 8. The burden is on the Appellant and sponsor to show that it would be unreasonable to expect them to live in Bangladesh and the Judge fails to consider this when holding that Art 8 is engaged and that the decision interferes in their Article 8 rights. See PG (USA) v The Secretary of State for the Home Department [2015] EWCA Civ 118 (26 February 2015) (bailii.org) [23] … The Secretary of State does not have to show that it is reasonable for the applicant to return to the United States on her own. The appellant has to show that it would be unreasonable to expect the family to live there together. If she fails to do that she has not discharged the burden – which rests on her – of showing that article 8 is engaged. If it is not shown to be unreasonable to expect the family to live in the US, or if the separation would be only short term, any interference with family life would not necessarily be of sufficient gravity to engage article 8 at all. The first two questions in Razgar would not be satisfied. This, however, has nothing to do with the proportionality test identified in questions 4 and 5 of Razgar, contrary to the understanding of the First Tier Tribunal judge as reflected in his judgment at [27]. It is only once the material interference with family life is established that the issue of proportionality arises. The First Tier Tribunal judge confused the two stages in the process, set the wrong test, and thereby misapplied the proportionality principle and the burden of proof. That was essentially the analysis of the Upper Tribunal judge and I agree with it.

(3) There is also a failure (at [28 & elsewhere) to take into account or attach the required weight to the longstanding policy of the Secretary of State, in rules approved by parliament, that precludes those in the sponsors position from bringing their spouses [and other family members] to the United Kingdom. It is also contended that this is a failure to properly consider s.117B (1).

(4) There is also a failure to take into account statute (s.117B (4)(a)) at [26] when considering the sponsors private life.

(5) The Judge impermissibly reduces the public interest at [28]. That the Appellant may meet the language and maintenance requirement cannot reduce the public interest (see Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC) (19 June 2015) (bailii.org)) particularly on the facts of the case where the sponsor has only limited leave.

(6) Adequacy of reasoning: It is unclear whether [23 – 24] are the representatives submissions or observations / conclusions of the Judge. There are no reasons given to explain why, on the particular circumstances of the case, it is ‘unjustifiably harsh’ to expect the Appellant / sponsor to continue a long term relationship (see [25] - [28]). There are no reasons given at [26] or elsewhere to establish there would be any harshness on the Appellant or Sponsor. The consideration of the sponsors private life at [26] is

un-particularised and on the broad points made cannot be described as constituting or contributing towards anything exceptional (See [37] of The Secretary of State for the Home Department v SS (Congo) & Ors [2015] EWCA Civ 387 (23 April 2015) (bailii.org)

23. The appeal came before the Upper Tribunal. The respondent was represented by Mr Diwnycz , Senior Presenting Officer and the appellant by Mr Marfat. I am grateful for the advocates for their respective submissions.

24. Mr Diwnycz relied upon the written grounds of challenge as set out above. He submitted that there was a misdirection in law by failing to identify or apply the standard of proof. He relied upon the 2nd part of the grounds. He further submitted that in discharging the burden of proof it would have to be shown by the appellant that it would not be reasonable to expect the family life to be maintained abroad and the fact that it may be harsh does not make it unreasonable. He referred to the factual circumstances that the sponsor lived in Bangladesh for some time outside of the UK. He further submitted that his position in the UK was "precarious" and that he had married the sponsor when he had no leave to remain.

25. When asked to provide details of the policy referred to in the grounds, Mr Diwnycz stated that it was a reference to the Immigration Rules and that this was a S 117B(1) point.

26. Mr Marfat confirmed that there was no rule 24 response provided on behalf of the appellant. He made the following oral submissions. There was no error of law in the decision of the FtTJ who had considered all the evidence and heard oral evidence from the sponsor and had the written evidence. Even if there was an error of law it would not be material. As to the grounds advanced, whilst the decision did not refer to the burden and standard of proof, it is possible to see that there was reasoning consistent with that.

27. He submitted that the point at issue was a narrow one because the appellant could not meet the rules and therefore GEN 3.2 applied. Applying they head note in Dube [2015] UKUT 90, it could not be an error of law to fail to refer to the S117A-D considerations if the judge applied the correct test. Thus he submitted the judge did not have to refer to every paragraph and the judge engaged with the paragraphs and took them into account when making a decision.

28. He submitted that paragraph 26 was the balancing exercise and found that for the appellant it would not be harsh to live in Bangladesh but for the sponsor there would be significant consequences. The balancing exercise was also carried out at paragraph 27.

29. He submitted that s117(4)(a) did not apply as the sponsor had leave to remain when he married in 2020 and therefore had regularised his stay. Getting married was his right and his choice. The appellant is not settled but that there a discretion applying GEN 3.2.

30. He distinguished the decisions cited at paragraph 2 of the respondent's grounds based on the factual differences. He submitted that the appellant cannot meet the Rules because the sponsor is not settled but GEN 3.2 is engaged and needed to be considered by a balancing exercise.

31. Mr Marfat submitted that the judge took into account the public interest considerations and that his submission was set out at paragraph 21, and that it is harsh where other categories are able to come to the United Kingdom such as students and one category are allowed but why should not other individuals also be allowed? He confirmed that paragraph 22 was his submission, and that paragraph 23 reflected the FtTJ's reasoning. He submitted that the judge distinguished S117B(1) because subsections (2) and (3) were not operative. Thus he submitted paragraph 23 was the balancing exercise, and as the appellant meets all the rules except one, S 117B was properly considered. The appellant can speak English and the financial requirements are met there are no other categories relevant and therefore immigration control is lessened. He has admitted that the judge did not have to provide an explanation for every section.

32. Mr Marfat referred to paragraph 25 and that the judge justified the circumstances as "unjustifiably harsh", and those paragraphs demonstrate how the judge carried out the balancing exercise.

33. He stated that family life and the relationship was not formed at a "precarious" time. The appellant was asked if he knew about his status, but he was not aware that she could not enter the UK. The witness statement set out that the appellant thought that she could come, and it was her expectation, and she was not aware of the rules. There were also references in the witness statement to trauma and social stigma and that it was not possible for the sponsor to go to Bangladesh. He further submitted that he could have been settled in 2001. The sponsor had explained why he could not get married in the UK and the respondent did not dispute that evidence.

34. He submitted that the judge did not reduce the public interest as on the facts of the case there was no criminality or problems related to suitability and as those issues were not there the public interest was reduced. The FtTJ accepted the submission made at paragraph 21 and set out his findings at paragraphs 23 – 28. This was the balancing exercise and thus there was no error of law in the decision. Even if there was an error of law it was not material because the circumstances were "unduly harsh".

35. Mr Diwnycz by way of reply submitted that the judge had impermissibly reduced the public interest, and this was maintained on behalf of the respondent. He reiterated his point that what mitigated against any harshness was that he married against the background of not meeting the rules and that she could not have expected entry clearance as there was no prospect of success in such an application. He referred to the precariousness and that the sponsor had had 2 other marriages.

36. Mr Diwnycz submitted that at paragraph 26 the reference job prospects was a generalisation.

37. At the conclusion of the hearing I reserved my decision.

<u>Decision on error of law:</u>

38. The central feature of the respondent's grounds relates to the balancing exercise carried out by the FtTJ and that in the balancing exercise there was not a lawful consideration of the public interest carried out. In other words, the

reasoning set out in the FtTJ's decision impermissibly reduced the public interest so that the overall balance was fundamentally flawed.

39. When assessing that issue I have considered with care the submissions made by Mr Marfat and have done so in the context of the decision of the FtTJ and taking into account the submissions that he made that this was an appeal where the FtTJ had heard the evidence. However I have reached the conclusion that the respondent has made out his central ground of challenge for the reasons that follow.

40. There is no dispute that the applicant cannot meet the Immigration Rules as she does not meet the Eligibility Relationship Requirement under paragraphs E-ECP2.1 to 2.10 as the sponsor (the applicant's spouse) is not settled in the United Kingdom having been granted limited leave to remain in September 2019. The application was therefore refused under paragraph EC-P.1.1 (d) of Appendix FM of the Immigration Rules.

41. Whilst Mr Marfat submitted that there was only a narrow issue to be determined by the FtTJ namely whether GEN 3.2 applied, however that question is not a narrow exercise but one that required a careful evaluation or assessment of all the factors including the public interest.

42. 'Section 117BArticle 8: public interest considerations applicable in all cases

> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English — (a)are less of a burden on taxpayers, and (b)are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons— (a)are not a burden on taxpayers, and (b)are better able to integrate into society.
>
> (4) Little weight should be given to— (a)a private life, or (b)a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where— (a)the person has a genuine and subsisting parental relationship with a qualifying child, and (b)it would not be reasonable to expect the child to leave the United Kingdom

43. The provisions of S117B were set out in the decision by the FtTJ although the FtTJ did not set out or reference S117A. It is not in issue that the FtTJ set out a reference to those statutory considerations but what is in issue is whether the FtTJ applied them correctly.

44. When assessing that question, the respondent's grounds questioned whether paragraph 23 of the decision was in fact the FtTJ's reasoning or the recitation of submissions. At the hearing Mr Marfat confirmed that the FtTJ set out what were his submissions at paragraphs 21 and 22 but that the remainder of paragraphs from 23-28 constituted the FtTJ's reasoning.

45. The submission set out at paragraph 21 was similarly made at this hearing namely that it is anomalous that someone who has leave to remain on the basis of 20 years long residence cannot sponsor a partner to come to the UK. Mr Marfat points out that some of the categories of person with limited leave to remain are able to do so. That submission fails to take into account the policy reasons that underlie the Immigration Rules. There are categories of entrants to the UK who are able to bring with them their dependents although those categories have been much reduced recently. They are in a different position to the appellant as whilst they are given leave to enter in line with their spouse and partner there is no expectation that they will necessarily be able to remain in the UK indefinitely. The basis of the application made (as set out in the letter at page 11 – 12) was that the parties had "produced documentary evidence with the application and intend to reside permanently in the UK." It is therefore plain that they wished to settle permanently in the UK. In any event it is for the Secretary of State to formulate the Rules and to regulate the entry of individuals to the UK in particular categories.

46. In this context the respondent's grounds are made out and as set out in the FtTJ's reasoning at paragraphs 23 and 28, the FtTJ failed to have regard to the respondent's policy. The policy reasons referred to in the grounds of challenge have been set out in a number of relevant cases. In TZ(Pakistan) and PG(India v SSHD [2018] EWCA Civ 1109 that policy was set out as follows:

> "23.The Secretary of State has a constitutional responsibility for the immigration policy which underpins the Immigration Rules which are endorsed by Parliament: they are the competent institutions responsible for determining policy within the national margin of appreciation. Although the courts can review the compatibility of the balance of factors that the Secretary of State strikes in formulating the Rules, courts and tribunals must bear in mind the constitutional responsibility for policy and the fact that the Rules are not and are not intended to be a summary of ECHR case law (see *Agyarko* at [46], [47] and [48]). Accordingly, it has been held to be lawful for the Secretary of State to set a requirement within the Rules that there be insurmountable obstacles to the continuation of family life in the country of proposed return."

47. On the facts of this case the appellant could not meet the relevant Rules and when considering the public interest that was a weighty consideration in the balancing exercise. The reasoning in the FtTJ's decision at paragraphs 23 and 28 that the "normally strong public interest in immigration control is much reduced because the appellant meets all the other requirements of the Rules that are designed to protect the public interest. There are no other public interest considerations engaged apart from the need for immigration control " misunderstands the nature of the public interest in play. The appellant cannot meet the eligibility requirement which is a central part of the Immigration Rule in question. This is because the sponsor is not settled in the UK. Whether a person is "settled in the United Kingdom" is defined is within the meaning of the Immigration act 1971- see section 33 (2)(A) of that act as follows; it defines a person settled in the UK if he is "ordinarily resident there without being subject

under the immigration laws to any restriction on the period for which he may remain."

48. This is a fundamental part of the relevant Rules and the fact that other parts of the Rules such as the financial requirement and the English language requirements are met does not reduce the other requirements of the Rules and thus the public interest. The FtTJ falls into legal error in his reasoning and as the grant of permission identifies the FtTJ applies a "near miss" to the Rules and thus the issue of proportionality. The applicant either meets the rules or they do not. There is no "near miss" principle in play and it could not reduce the public interest in the way reasoned.

49. The legal error in assessing the public interest can also be seen at paragraph 23 and at paragraph 28 when read together. The FtTJ appears to adopt the reasoning at paragraph 23 in the conclusion at paragraph 28 as the FtTJ finds that "where there is such a reduced public interest I conclude that the decision does have unjustifiably harsh consequences. I conclude that the interference of family life is disproportionate bearing in mind the reduced strength of the public interest in this case." The phrase used of "such a reduced public interest" can only be a reference to the earlier finding or reasoning that the applicant can meet the Rules relating to the financial requirements and the English language requirement and therefore the other public interest considerations at S117B(2) and (3) do not count against the applicant. That reasoning is flawed.

50. By section 117A (1) Part 5A of the 2002 Act applies when a court or tribunal is required to determine whether a decision made under the Immigration Acts would breach a person's right to respect for private and family life under article 8 of the ECHR. In such a case the "public interest" question is defined as being whether an interference with a person's right to respect for family and private life is justified under article 8 (2) of the ECHR (see S 117A (3)). When considering the public interest question a court or tribunal "must" (in particular) have regard in "all cases" to the considerations in S117B, here section 117C does not apply) (see S117A(2)).

51. I pause here to observe that the public interest considerations set out at section 117B are not a closed category as demonstrated by the use of the words "in particular" and that other relevant considerations to the public interest may be taken into account if they are relevant to the balancing exercise on the question of the public interest (see Kaur v SSHD [2023] EWCA Civ 1353 at paragraph 21 referring to GM at [32]). Thus in principle there is no limit to the factors which might be relevant in an evaluation of article 8 which is "fact sensitive". This is an answer to the submission made by Mr Marfat that the references made to the public interest considerations under S117B do not apply to the sponsor because he is not in the UK unlawfully or that his status as precarious is not relevant to the balancing exercise.

52. Returning to the FtTJ's reasoning the FtTJ reduced the public interest because it was considered that the appellant could meet the financial and English language requirements. This was taken into account in the public interest question by applying section 117B (2) and (3) as set out in the reasoning at paragraphs 23 and later paragraph 28. As set out the maintenance of immigration control is a weighty consideration given that the appellant could not meet the central feature of the rules that being the eligibility requirement and the strength of the public interest of immigration control is reflected by the respondent within the Rules. The Rules are not a product of legal analysis; they

are not intended to be a summary of the Strasbourg case law on article 8 they are a statement of the practice to be followed which are approved by Parliament and are based on the secretary of state policy as to how individual rights and article 8 should be balanced against the completed public interests. They are designed to operate on the basis of decisions taken in accordance with compatible article 8 in all but exceptional cases (see Agyarko and Lord Reed at [46-47]), and therefore are to be considered as to where the fair balance is struck.

53. Whilst the FtTJ referred to the “strong public interest” it was qualified by the use of the word “normally” and that it was “much reduced” because the public interest considerations under section 117B (2) and (3) did not operate against the applicant. To reduce the public interest in this way is incorrect. In Forman (ss117A-C considerations) [2015] UKUT 412, it was stated:

> "(i) The public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.
>
> (ii) The list of considerations contained in section 117B and section 117C of the Nationality, Immigration and Asylum Act 2002 (the '2002 Act') is not exhaustive. A court or tribunal is entitled to take into account additional considerations, provided that they are relevant in the sense that they properly bear on the public interest question.
>
> (iii) In cases where the provisions of sections 117B-117C of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect."

54. In essence they are neutral in the sense that they do not positively weigh in favour of entry clearance.

55. I also accept the respondent’s grounds where it is argued that the FtTJ reached no conclusions as to whether or not family life could be maintained in Bangladesh. This is a relevant consideration in the proportionality balance. This is because the Secretary of State's 'Instructions' to decision makers recognise that there are circumstances outside the Rules in which it will be necessary to grant leave to remain to avoid a breach of article 8. The Secretary of State's policy is that such leave should only be granted where exceptional circumstances apply, i.e. circumstances in which refusal would result in unjustifiably harsh consequences for the person concerned. The legality of this policy and the test that is articulated were accepted in *Agyarko* (see [19] and [48]).

56. At paragraph 24 the FtTJ sets out the 2 scenarios if entry clearance is not granted. The parties either conduct a long-distance relationship for many years until the sponsor has settled status or they choose to conduct family life in Bangladesh. Whilst the FtTJ set out his reasoning at paragraph 25 that he was in no doubt that it would be unjustifiably harsh expect them to conduct a long-distance relationship until the sponsor had settled status in several years’ time and when he could not make extended visits there, the FtTJ identified that the more difficult question is “whether it is unjustifiably harsh to expect them to continue their family life in Bangladesh” rather than the UK. At paragraph 26

the FtTJ set out the potential effects on both the sponsor and the appellant. In the case of the appellant the judge considered it would be less harsh given that she is a national of Bangladesh, all of her family live there. As to the sponsor, the FtTJ found that the effect would be "more significant" because he was used to living in the UK, had inevitably developed ties here given his length of residence and that he had the more immediate family members there although not as parents or children and is on the pathway to settled status. The FtTJ took into account that he was employment that he would lose and his job prospects in Bangladesh were not likely to be good. The FtTJ level found the consequences as "very significant" should he leave the UK. However the FtTJ does not reach any conclusion as to whether there are any "insurmountable obstacles" to family life being maintained in Bangladesh or whether or not it would be unjustifiably harsh for family life to be maintained by the parties there. This is supported by the partial assessment at paragraph 27 where the FtTJ sets out further findings that the appellant retains family members in Bangladesh, he is familiar with the language and culture despite his length of residence in the UK and has recently been there to marry and that without background country evidence his job prospects are likely to be worse, but the FtTJ did not accept that they are "so bad that they are likely to be destitute". However when those paragraphs are read together there is no concluding reasoning on that key issue.

57. It is because of the earlier reasoning at paragraph 23 and the finding made that "such a reduced public interest" that the FtTJ concluded at paragraph 28 that there were unduly harsh consequences. That is the reason that the FtTJ appeared to be saying that the public interest was such reduced "that the decision does have unjustifiably harsh consequences" that is further underscored by the reference that the interference of family life is disproportionate "bearing in mind the reduced strength of the public interest in this case".

58. The FtTJ does take into account that the parties either knew or should have known that when the sponsor entered a relationship with and married the appellant that she would not meet the Immigration Rules to enter the UK to spouse and therefore that they may have to live together elsewhere if she could not obtain leave outside the rules. The FtTJ concluded that family life was precarious. Whilst Mr Marfat submitted that the appellant had stated that she was not aware she could not enter the UK and there were similar references in the sponsor's witness statement and that that was not disputed, it does not seem to be reflected in the FtTJ's assessment at paragraph 27 and as it stood and without any further findings to the contrary this was a consideration weighing against the appellant and the sponsor. There is no general obligation to respect a married couple's choice of country and it will depend on the particular circumstances of the persons concerned and on the facts of this case as identified in Agyarko (citing the case of Jeunesse) taking into account whether family life is created at the time with the people involved knew the immigration status of one of the parties was such that it was "precarious". In this context the sponsor does not have settled status and therefore it must have been clear that the appellant would not be able to meet the Rules, and this is a relevant consideration under section 117A or S117B (1)).

59. For those reasons, the respondent has identified material errors of law in the assessment of proportionality. Any assessment of proportionality under article 8 of the ECHR is required to balance the rights of the individual against other

matters and in an appeal such as this and on its own particular facts, the grounds demonstrate that the FtTJ impermissibly reduced the public interest. The rules themselves are the authoritative statement of the demands of the public interest and it is implicit in an appeal where the individual does not meet the requirement of the rules, the public interest would appear to outweigh the demands of the individual applicant. Whilst it is possible that in a particular facts in an appeal the public interest might be outweighed, that would require the public interest to be properly weighed in the balance and as identified in this case in addition the FtTJ did not reach any conclusion on whether family life could be maintained in Bangladesh.

60. The FtTJ erred in law for the reasons identified and, in a manner which could have a material effect on the outcome. The decision is therefore set aside pursuant to Section 12 (2) (a) of the Tribunals, Courts and Enforcement Act 2007 (TCE 2007). No findings are preserved. The nature of the error of law is such that it is material to the outcome as the error related to the matters relevant to the proportionality balance and how it should be considered. Whilst it is generally a matter for the judge to determine the weight of factors considered, in the case of Kaur v SSHD [2023] EWCA Civ 1353 Stuart-Smith LJ referred to the margin of appreciation in determining the weight to the factors considered but confirmed the margin is not unlimited in particular, the court must attribute significant weight to the respondent's policy at a general level.

61. When addressing the issue of the remaking of the decision I take into account in exercising discretion that Mr Marfat submitted that if the error were material it could be remitted to the FtT. In fairness to the appellant and to the sponsor and by reference to matters raised by Mr Marfat that there appeared to be other evidential factors that were not taken into account for example, the appellant's age and the ability to have a family, and the issues raised in the witness statement about the cultural expectations for a married woman in Bangladesh. He also referred to some updated evidence. and thus I have concluded that the remaking of the appeal should take place in the First-tier Tribunal (Begum (remaking or remittal) Bangladesh[2023]UKUT 0046 (IAC) considered).

62. I therefore set aside the decision for it to be remitted to the FtT for a hearing and whilst the error involved the ultimate balancing exercise, that necessarily included consideration of the factual circumstances as a whole. In fairness to the appellant and the sponsor, the balancing exercise may be affected by the assessment of the factual findings and the hearing of the evidence and that those two things should be considered together and that this is best achieved in fairness to the appellant and sponsor by a fresh hearing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside. The appeal shall be remitted to the FtT for a rehearing at Newcastle on the first available date to be fixed (not before Judge Moran).

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

4/6/24