Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/01206/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 24 April 2015

Determination Promulgated
On 29 April 2015

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mr MD ABDUL HALIM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M B Hussain, Solicitor (instructed by Jalalabad Law Associates)
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by Upper Tribunal Judge Rintoul on 11 February 2015 against the determination of First-tier Tribunal Judge Hodgkinson who had dismissed the Appellant's appeal under Appendix FM as a spouse of a British Citizen and on human rights

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(Article 8 ECHR family life) grounds against his removal in a determination promulgated on 15 September 2014.

2. The Appellant is a national of Bangladesh, born on 17 June 1984. The Appellant had married his British Citizen spouse while in the United Kingdom lawfully on 13 December 2012. He had then sought a variation of leave to remain as a spouse. Judge Hodgkinson found that Appendix FM was not met, in that the income requirement had not been satisfied and that EX1 did not apply: see [35] of the decision. There were no compelling circumstances not sufficiently recognised under the Immigration Rules which rendered the Secretary of State's decision disproportionate under Article 8 ECHR.

3. Permission to appeal was granted by Upper Tribunal Judge Rintoul because he considered that it was arguable that the judge had erred by failing to consider section 117B of the Nationality, Immigration and Asylum Act 2002 when reaching his decision.

4. Standard directions were made by the tribunal, indicating that the appeal would be reheard immediately if a material error of law were found. A rule 24 notice dated 25 February 2015 opposing the appeal had been filed on the Respondent's behalf.

Submissions – error of law

5. Mr Hussain for the Appellant relied on the grounds of onwards of appeal and the grant of permission to appeal. Chikwamba [2008] UKHL 40 was relevant but the judge had not considered it all. More importantly, the judge had not dealt with the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002 which weighed in the Appellant's favour. Indeed the judge had not mentioned 117B at all. Although Dube [2015] UKUT 00090 (IAC) showed that there need not be express reference to the statute, the judge was required to consider the factors. He had not. The Appellant was English speaking. He had been in the United Kingdom lawfully at all times. Although it was accepted that the income requirement of Appendix FM had not been met, that of itself did not mean that the Appellant would not be self sufficient: there was, for example, free accommodation available. Given that the sponsor had lived in the United Kingdom since the age of 4, spoke little Bengali, and that her whole family lived in the United Kingdom, and that her mother was dependant on her, it was unreasonable to expect the British Citizen sponsor to live her family life with her spouse in Bangladesh: see, e.g., AB (Jamaica) [2007] EWCA Civ 1302. The judge had not addressed proportionality adequately and had focussed excessively on the public interest.

6. Mr Kandola for the Respondent relied on the rule 24 notice. He submitted that the judge's decision had been open to him and sufficiently addressed

section 117B although it had not been mentioned. If the judge had failed to state that the Appellant spoke English it was not a material error of law. The reality was that the Appellant had not met the income requirements and the judge had given adequate reasons for finding that there were no insurmountable obstacles to family life being led in Bangladesh. SS (Congo) [2015] EWCA Civ 387 showed that the judge had taken the right approach.

7. Mr Hussain addressed the tribunal in reply. SS (Congo) [2015] EWCA Civ 387 showed that there remained a potential gap between the requirements of the Immigration Rules and Article 8 ECHR which could render refusal/exclusion disproportionate. Here there was just such a gap, which made the judge's decision unsustainable.

8. The tribunal indicated at the conclusion of submissions that its determination was reserved.

No material error of law finding

9. It was not in dispute before Judge Hodgkinson that the Appellant failed to meet the income requirement of Appendix FM. That requirement has been controversial but MM (Lebanon) [2014] EWCA Civ 985 states the current law. In the tribunal's judgment it was open to the judge to find that the demanding requirements of EX.1 of Appendix FM were not met by the Appellant. There was no suggestion that the judge had erred in his findings of fact. The determination shows that the judge meticulously recorded the submissions made on the Appellant's behalf: see, in particular, [24] onwards of the determination. He noted that there were various difficulties for the sponsor and her family if she left the United Kingdom but he explained why he found that they were less serious than had been claimed and that there were no insurmountable obstacles: see [32] to [34] of the determination. That finding disposed of any Chikwamba [2008] UKHL 40 issue, because Chikwamba was decided before the changes to the Immigration Rules introduced on 9 July 2012. The factual matrix of Chikwamba [2008] UKHL 40 was in any event far removed from the facts of the present appeal. There was, for example, no fear of return to Bangladesh by either spouse. There is no error of law in Judge Hodgkinson's analysis of the case under the Immigration Rules.

10. In the tribunal's judgment, Judge Hodgkinson had adequately considered the substance of section 117B of the Nationality, Immigration and Asylum Act 2002, despite making no express reference to the statute by name, when assessing proportionality under Article 8 ECHR. Dube [2015] UKUT 00090 (IAC) applies. It was not in dispute that the Appellant spoke English, in which language he gave his evidence: see [14] of the determination. It was a point in the Appellant's favour but it was hardly a decisive one in itself and required no special mention. If that approach

were wrong, and the English language positive factor should have been mentioned, the tribunal finds in the alternative that any error of law was not material because the matter was not decisive when set against other factors: see Dube (above).

11. More relevant was section 117B(3), financial independence. The definition of financial independence for the purposes of settlement in the United Kingdom as the spouse of a British Citizen is set out in Appendix FM. For such purposes the earning power of the applicant must be ignored, as indeed must be other potential benefits such as free accommodation or third party support. The sponsor's earnings fell well short of the applicable requirement of £18,600. To that extent, therefore, financial independence did not exist and there was no such positive factor available to the Appellant. The inability to satisfy the financial requirements of Appendix FM was not in issue and there was thus no need for the judge to say anything more on the subject.

12. It may be, in the light of SS (Congo) (above), that there could be factual situations where there might be a gap in proportionality terms between Appendix FM and Article 8 ECHR. How that squares with the principles of Miah and ors v SSHD [2012] EWCA Civ 261 will no doubt be explored. But on the facts found by the judge there was not only a large gap between the couple's actual income and the requirements of Appendix FM, there was also the choice open to them of living their family life in Bangladesh. It was not necessary for the judge to say so, but there were obviously other choices open to them as well, for example, for the sponsor to seek better paid employment in the United Kingdom and then to make a fresh entry clearance application for the Appellant. It was not a situation where there never any prospect of compliance with the Immigration Rules. Nor was it a situation where there was no place in which the couple could safely live their family life: as the judge pointed out, the Appellant's family lived in Bangladesh and so there would an element of wider family separation whether the couple lived in the United Kingdom or in Bangladesh.

13. A further relevant factor, as Mr Kandola submitted, was the fact that in terms of section 117B(5), the Appellant's immigration status was precarious. That term has yet to be defined judicially, but it is plain that while the Appellant was in the United Kingdom lawfully at the date of his variation of leave to remain application, he had been admitted to the United Kingdom for a temporary purpose only which had been fulfilled and he had no expectation that settlement would become available to him. Again that factor counted against the Appellant, so it was hardly necessary for the judge to mention it. Any such failure cannot be said to be a material error of law.

14. The judge was entitled to find on the evidence before him that there were no compelling, compassionate or exceptional circumstances which might

have required the Secretary of State to consider the exercise of discretion outside the Immigration Rules in the Appellant's favour. On the contrary, it was obviously open to the Appellant to submit a fresh and compliant application at a future date, and it was proportionate to the legitimate objective of immigration control to expect him to do so.

15. Patel v SSHD [2013] UKSC 72 shows that Article 8 ECHR creates no general power to dispense with the requirements of the Immigration Rules. The tribunal finds that there was no material error of law in the determination and there is no basis for interfering with the judge's decision.

DECISION

The making of the previous decision did not involve the making of an error on a point of law and stands unchanged

Signed **Dated 29 April 2015**

Deputy Upper Tribunal Judge Manuell