In the Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05074/2018
HU/05081/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 December 2018	**On 30 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

SALAH UDDIN (1)
FIROZA [A] (2)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Unrepresented
For the Respondent: Mr E Tufan, a senior Home Office presenting officer

DECISION AND REASONS

Introduction

1. In this decision I will refer to the parties by the designations before the First-Tier Tribunal (FTT) notwithstanding that their roles are reversed in the Upper Tribunal (UT). They appeal to the U T with the permission of FTT Judge Saffer who, on 30 October 2018, identified that the decision of First-tier Tribunal Judge Beach (the judge), may

contain a material error of law because the article 8 analysis, having regard to the case of **Agyarco v SSHD [2017] UKSC 11,** may have been flawed and the judge may have "struck the wrong balance". The judge heard the appellants' appeal against the respondent's refusal to refuse to grant either of the appellants leave to remain in the UK on human rights grounds.

The Appellant's Immigration Background and History

2. The first appellant is a citizen of Bangladesh who was born on 1st of January 1987. The second appellant was born on 23 October 1983. They are married to one another.

3. The first appellant came to the UK on 23 March 2009 with leave to enter as a student. He had valid leave to remain until 30 June 2009, but this was extended as a Tier 4 (General) Migrant until 17 April 2011. The first appellant applied for further leave to remain as a Tier 1 (Post study work migrant) valid until 26 April 2013. On 25th of April 2013 the first appellant applied for and was granted further leave to remain as a Tier 4 (General) Migrant until 30 April 2015. On 29th of April 2015, the first appellant applied for further leave to remain as a Tier 4 (General) Migrant and was granted leave to remain until 29th of August 2016. Finally, on 26 April 2016, the first appellant applied further leave to remain on the basis that he had formed a private or family life in the UK and that it would be unlawful for the respondent to interfere with those rights but for reasons which do not appear relevant the appellant made another application for leave to remain on the same basis on 8 December 2016.

4. The second appellant entered the UK on 20 April 2012 with leave to enter as a Tier 1 (Post-study work partner) valid until 26 April 2013. The second appellant applied for further leave to remain as a dependent and was granted further leave to remain as a Tier 4 (Gen) migrant valid until 30 April 2015. On 29th of April 2015 the second appellant applied for further leave to remain and was granted further leave to remain as dependent of a Tier 4 (Gen) migrant valid until 29 August 2016.

5. On 26 August 2016 both appellants applied for leave to remain on the basis of their private and family lives in the UK and on 8th of December 2016. On 6 February 2018 the decision was made to refuse the applications. The appellants subsequently appealed those refusals on or about 14 February 2018.

6. The respondent gave her reasons for refusing the applications in a letter dated 24th of August 2017. In that letter the respondent explained that decision not involving a child the correct approach had been set out by the Supreme Court in the case of **MM (Lebanon) v Secretary of State [2017] UKSC 10**. The relevant provisions are found in Appendix F M and paragraph 276 ADE (1) of the (new) Immigration Rules, which took account of the need to respect human rights law. Those changes were introduced as a consequence of the

case of **MM (Lebanon) v SSHD [2017] UKSC 10.** They came into force on 10 August 2017. The applications were considered under R – LTRP.1.1 (a) (b) and (d) of Appendix FM (which are found at page 1288 of Immigration Law Handbook 10th edition). That paragraph forms part of Appendix FM Family Members "Requirements for limited leave to remain as a partner". However, the appellant did not qualify under the 10-year partner route for reason of the fact that under R – LTRP.1.1. (d) (ii) the appellants did not meet all the eligibility requirements of E – LTRP of Appendix FM. It was accepted that neither appellant fell for refusal under R–LTRP.1.1.(d) (i) – i.e. the applications did not fail on grounds of suitability. But, the eligibility requirements under R – LTRP.1.1 (d) (ii) were not met because the applicant's partner must be a British citizen, present and settled in the UK whereas the first appellant's partner, Firoza [A], is a Bangladeshi citizen who applied for family and private life in line with his application. The EX.1 exemption from the eligibility requirements were considered under R – LTRP 1.1.(d) (iii) of Appendix FM and paragraph EX.1 applied in the first appellant had a genuine and subsisting relationship with a child qualified under paragraph EX 1. (b). The first appellant did not succeed under EX 1 (a) because his child ([A]), who had only been born in September 2016, has been less than seven years in the UK and therefore subparagraph (cc) was not satisfied. EX.1.(b) did not apply because although the first appellant had a genuine and subsisting relationship with a partner who is in the UK, even if she was a British citizen or were settled here there will be no "insurmountable obstacles" to continuing family life between the appellants and their child in Bangladesh.

7. In relation to the second appellant, the respondent reached the same conclusion in relation to EX.1.(a) and in relation to E X.1.(b). The respondent noted that the appellants would be returning as one family unit with their child to Bangladesh where they would be expected to help each other re-adjust to Bangladeshi life. The respondent noted that, with the exception of their child [A]. The appellants have spent the bulk of their lives in that country.

8. The appellants' appealed against the respondent's refusal to grant further leave to remain to the First-tier Tribunal (FTT). The appeal was heard on 28th of June 2018 and promulgated on 20 July 2018.

9. The judge found articles 3 and 8 of the ECHR were potentially engaged. She accepted evidence from Dr Tahir, a consultant rheumatologist, that the second appellant suffered from rheumatoid arthritis and is currently on medication at a cost to the NHS. She noted that the threshold for succeeding in article 3 and 8 on medical grounds was a high one. Whilst the judge noted that there was a "significant public interest in removing those with no basis to remain in the UK particularly when NHS resources will be used by an applicant", she nevertheless found that there was evidence that it would be difficult for the second appellant to receive medication in Bangladesh. Overall, at paragraph 23, she appeared to accept that

medication would be available in Bangladesh and therefore the respondent would not be in breach of article 3 or 8 of the ECHR if the second appellant were returned to Bangladesh. However, subsequently, the judge contradicted herself by stating that medication in some cases not is not available at all or is only available at substantial cost. In paragraph 28 the judge therefore concluded that the respondent had nevertheless not shown here her decision was "a justified, necessary and proportionate" one.

10. The grounds of appeal to the appeal to the UT attack the judge's decision because it is stated that the judge appeared to have concluded that the appellants couldn't succeed on article 3 or article 8 grounds, on the basis of the second appellant's medical needs, but had then gone on to allow the appeal. In any event the second appellant's medical condition did not require both appellants to stay in the UK and exercise their right to respect for a family and private life here. The judge found that the respondent had correctly decided that there were no significant obstacles to the appellants continuing their family life in Bangladesh and therefore that the respondent had correctly decided the case under the rules. In so far as there had been any appeal under the rules, which following the commencement into force of the Immigration Act 2014 there was not, that appeal would have been dismissed on the basis that there were no "very significant obstacles" to the reintegration of the appellants into society in Bangladesh. It was bizarre that the judge has subsequently gone on to apparently finding the appellant's favour on article 8 grounds. The judge had materially erred by allowing the appeal under article 8, if indeed she intended to do so. The second appellant suffers from rheumatoid arthritis, but the second appellant was not receiving the medication which she is now receiving at the date of the respondent's decision. The judge does not consider alternative medications available in Bangladesh. Furthermore, the medication she was currently on was provided as part of a drug trial and there is no guarantee it will permanently be available in the UK, even if the appellant is a foreign national were entitled to it. The judge failed to follow the guidance in **GS India** or **MM (Zimbabwe) [2012] EWCA Civ 279** in relation to healthcare cases. The ECHR did not impose an obligation on a contracting state provide those liable to deportation (or removal) with medical treatments and it was submitted following the leading case of **Agyarko** that very similar principles apply in a removal case/an application for leave to remain to those enunciated in the above-mentioned cases. Unjustifiably harsh consequences must be established to bring the case within article 8. No consideration was given to the leading cases before the UK Supreme Court and Court of Appeal quoted above. The respondent applied for and obtained permission to appeal.

The hearing

11. The appellant did not attend the hearing but submitted by fax a document which I will treat as a rule 24 response. The appellant

claimed that the FTT determination had correctly allowed the appellant's appeal having heard evidence including medical evidence confirming the drugs the appellant (Firoza [A]) took worked but would not be available in Bangladesh.

12. But Mr Tufan described the reasoning as "confused" and pointed out that it was very difficult to understand the basis of the judge's decision. Family life had been precariously formed in the absence of any clear evidence the case failed to reach the high standard required for an article 3 or an article 8 claim based on medical grounds. I was referred to the case of **G S** presumably a reference to the case reported at **[2015] EWCA Civ 40**. I was therefore invited allow the appeal by the respondent and set aside the decision of the FTT and re-make the decision in favour of the respondent.

13. At the end of the hearing I reserved my decision as to whether there was a material error of law but indicated I was going to allow the appeal and remake the decision based on the evidence before the FTT.

Discussion

14. The judge's decision is confused appears to waver between dismissing the appellant's appeal and allowing the appeal. As Far as one can discern the reason for the decision, it seems to have been that the second appellant was receiving an experimental form of treatment to deal with her rheumatoid arthritis and the judge was not satisfied would be available in Bangladesh. Her symptoms on receiving that treatment were described as "significantly improved" by her consultant at paragraph 20 of the decision. This had a direct beneficial impact on the second appellant's quality of life and increased her ability to properly participate in caring for her child. Thus, the judge's reasoning seems to have been, the quality of family life would be improved by allowing the second appellant to continue to receive medical treatment at a cost to the NHS in the UK.

15. The problem with the judge's analysis, apart from the fact that it is inconsistent and contradictory, is that the judge ignored well-established case law. Article 3 is only available in "health cases" where there were exceptional circumstances. The judge appeared to recognise this principle but then failed to apply it in her decision. In particular, the case of **N v UK [2008] ECHR 453** illustrates that the inability to obtain medication in a foreign country will not usually give ground rise to a claim for breach of article 3 of the ECHR. To require a contracting state to provide medical treatment to a foreign national placed too much of a burden on its resources and it would only be in the most exceptional cases, such as the immediate prospect of an early death, that a court or tribunal would be able to treat a failure to be able to continue with medical treatment as inhuman and degrading treatment by a contracting state.

16. As far as article 8 is concerned, this has recently been considered a number of cases including **Paposhvili v Belgian [2016] ECHR 1113**. For an article 8 claim to succeed there must be some separate additional factual element in the case to bring it within the article 8 paradigms. There is a very strong public interest in ensuring immigration control and the control of the economic costs of healthcare to foreign nationals, which formed part of the public interest. This is reinforced by the changes introduced in Part 5A of the Nationality, Immigration and Asylum Act 2002 (2002 Act) by the Immigration Act 2014. The maintenance of effective immigration control is in the public interest as is the need to ensure those seeking to remain in UK are less of a burden on taxpayers.

17. I am satisfied that the judge failed to give a clear decision or demonstrate that she understood the need to strike a proper balance between the appellant's desire healthcare to a high standard and the respondent's need to respect the economic well-being of the United Kingdom and the need for proper immigration control over foreign nationals. In this case it's is necessary to set aside the decision as containing material error of law, therefore. It is therefore necessary to remake a decision.

18. Standard directions were sent out in November 2018 informing the appellant that in the event that the UT decided it was necessary to remake the decision it would do so based on the evidence before the FTT. However, either party had the right to apply to adduce any evidence was not before the FTT under rule 15 (2A) of the Tribunal Procedure (U T) Rules 2008. Such an application need to justify why such evidence had not been produced before the FTT. No such application has been made in this case and in the circumstances I have decided to remake the decision based on the evidence before the FTT.

19. Clearly, applying the above law, it is necessary to strike a balance between the second appellant's need for long-term treatment for rheumatoid arthritis and the need to ensure that those public interest factors discussed above tipped the balance in favour of the appellant rather than the respondent.

20. First of all, rheumatoid arthritis is a common condition, particularly among older people. Although I do not seek to decry the painfulness of rheumatoid arthritis and the improvement in the appellant's condition by administering appropriate medication, her condition cannot be described as "life-threatening". However, her consultant states that her long-term condition will deteriorate as a result of not receiving her current medication because of an increase in associated morbidity with a possible potential reduction in life expectancy. There is no doubt the current medication improves the quality of the second appellant's life, and it is probably correct to say this will have an impact on her family life including her ability caring for her child. However, to suggest in paragraph 28 of the judge' s decision that if

the second appellant returned to Bangladesh her child would effectively "be deprived of a parent" appears to be without foundation.

21. Secondly, the appellant was on an experimental form of medication and there was no guarantee would be available in the long term even if she were allowed to stay in the UK.

22. Thirdly, there was no proper enquiry as to whether such medication would be available in Bangladesh and the onus of proving that she qualified on this ground lay on the appellant not on the respondent. The judge herself said (at paragraph 23): "the evidence is not that the second appellant would have no access to any medication in Bangladesh but rather that she would not have access to the particular medication which she is currently receiving, and which improves her standard and quality of living." The respondent has asserted that suitable rheumatoid arthritis treatment is available in Bangladesh and no evidence has been placed before the UT to contradict that assertion.

23. Fourthly, there is no obligation on the UK to provide health treatment to foreign nationals. It is no function of article 8 to enable foreign nationals to form a private or family life where they wish to. It is not appropriate to carry out a comparison between medical facilities available in an advanced Western country and a less advanced eastern country. There may be exceptional circumstances where an applicant may qualify under article 8 grounds because of the need for health facilities, but these circumstances do not appear to encompass the circumstances in this case. Essentially, a very strong and compelling claim is required, and it is noteworthy here that the whole family unit to return to Bangladesh, the country that the first and second appellant had lived in their lives as one family unit. I do not accept level of disruption consequence upon having to find alternative treatments in Bangladesh would have a significant impact on the appellants family life in general. There is a mere assertion by the appellant this medical treatment would not be available in Bangladesh.

24. I am satisfied that the respondent took account of the rights of the child, but that child was only two years of age and has not yet been absorbed into the UK education system.

25. I am satisfied that the respondent's decision took account all relevant factors and therefore that the correct conclusion ought to have been that the respondent's decision was in accordance the law and specifically in accordance with article 8, the principal article relied upon here.

Conclusion

26. The respondent's appeal to the UT is allowed.

Notice of Decision

The respondent's appeal to the U T is allowed. I set aside the decision of the FTT and remake the decision.

The decision of the U T is that the appeal FTT on human rights grounds/ under the immigration rules is dismissed.

No anonymity direction is made.

Signed Date 18 January 2019

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 18 January 2019

Deputy Upper Tribunal Judge Hanbury