



**UPPER TRIBUNAL
(Immigration and Asylum Chamber)**

Appeal Number: OA/20537/2013
OA/20538/2013
OA/20539/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 25 February 2016**

**Decision & Reasons Promulgated
On 9 March 2016**

**Before
JUDGE DRABU CBE**

**Between
MRS RUPIA BEGUM
MISS HALIMA BEGUM
MASTER SAIDUR BEGUM
ANONYMITY DIRECTION NOT MADE**

Appellants

**and
ENTRY CLEARANCE OFFICER, DHAKA**

Respondent

DECISION AND REASONS

Representation:

For the Appellant: Mr N Ahmed of counsel, instructed by Lincoln's Chambers, Solicitors.
For the Respondent: Mr I Jarvis, Home Office Presenting Officer.

1. The appellants are citizens of Bangladesh. The principal appellant, Mrs Rupiah Begum is the mother of the two other appellants. She was born on 20 October 1968 and the dates of birth of the children are 2 October 1995 and 6 April 1997. They sought and were refused entry clearances to join their father/husband, Mr Abdul Wahid, a person present and settled in the UK on the grounds that paragraphs EC-P 1.1 and E-ECP 3.1 of Appendix FM of the Immigration Rules. Their appeals brought under Section 82 (1) of the Nationality, Immigration and Asylum Act 2002 were heard by First Tier Tribunal Judge Cohen at Taylor House on 2 December 2014 for reasons given in his determination promulgated on 29 December 2014.
2. The appellants were granted permission to appeal to Upper tribunal by Upper Tribunal Judge F Lindsay for reasons set out in her decision of 1 December 2015.

3. I had the benefit of receiving written skeleton arguments from Mr Ahmed as well as Mr Jarvis. I also received oral submissions from them. Mr Ahmed for the appellant had served a paginated bundle of documents consisting of 109 pages in all and this bundle of documents properly indexed and paginated had also been before the First Tier Tribunal. I understood from both parties that the appeals raised only two issues – one of financial ability of the sponsor and the second about whether the principal appellant was or can be exempt from the language requirement under the Rules. Both these issues had been found not to have been met by the principal appellant in the findings made by the First tier Judge. The appellants advanced the contention in their grounds of appeal that the two requirements were met and in concluding that they had not, the First tier Tribunal had made material errors in law. Mr Jarvis, representing the respondent argued that the determination was sound and that there was no material error of law. References to Pakistan in the determination were manifestly erroneous but had no effect on the final outcome of the appeals. He asked that the appeals be dismissed.
4. The First Tier Tribunal Judge engaged with the sponsor's financial ability in Paragraph 11 of his determination. In this paragraph the Judge makes no mention of the documentary evidence placed before him stating that the sponsor's income as a chef had been in excess of £24,000. This evidence was in the bundle of documents pages 94 to 102 including copies of self assessment of income filed with the HMRC. The First tier Judge said that "the claimed income is not shown entering the sponsor's account. There are very large unexplained deposits from a third party S Hoque. The sponsor's evidence concerning his claimed income, method of payment, hours etc. was vague, implausible and unconvincing. He did not submit the specified documentation with the application. The accounts are unaudited and merely based on evidence provided by the sponsor and I attach limited weight thereto (Tanveer Ahmed). The sponsor has ongoing health issues and I do not find his claim of working up to 100 hours a week £8.33 p.h. £800 weekly pay) to be credible."
5. In a detailed and comprehensive decision, the Upper Tribunal Judge Lyndsey had the following to say in paragraph 5 of her decision granting permission: "It is arguable that the First tier Tribunal has erred in law in failing to specify at paragraph 11 of the decision what specified evidence from Appendix FM-SE was missing given that this was the basis on which the entry clearance officer refused under the financial requirements. Judge Cohen seems to have misunderstood his task which was simply to assess whether the required evidence had been provided, and not to decide what was needed. It is not contended by the sponsor that he was unwell, and this would seem to be an irrelevant matter which may have been brought into play. It is also clear from the entry clearance refusal that unaudited accounts can be sufficient to meet the evidential requirement at Appendix FM-SE. It is arguably irrelevant whether there are unexplained deposits into the sponsor's bank again: again

all that is in issue is whether the relevant specified evidence was present before the Tribunal." In her paragraph 6 Upper Tribunal Judge Lindsay says, "The arguable errors relating to the refusal are arguably material to the outcome under the Immigration Rules as the second and third appellants' appeals only had to satisfy this matter to succeed." In paragraph 8 of her decision Judge Lindsay states, "The findings relating to Article 8 ECHR would appear to be strongly arguably unlawful. Not only do they refer erroneously to Pakistan they also state that there is no family life relationship between the sponsor and the appellant when it has been accepted at paragraph 2 of the decision letter that they are a genuine family with the first appellant being the sponsors' wife in a subsisting and genuine relationship, and the second and third appellants being their children. In the light of the first appellant's ill health it cannot be concluded that this ground is totally without prospect of success, if the appeal were remade."

6. I have given careful consideration to all the relevant documents and oral submissions made by Mr Jarvis and Mr Ahmed. I have reminded myself only if I find that the determination had one or more material errors of law, I can interfere with the decision made by the First tier Tribunal. The onus on establishing material error of law is upon the appellants. Having studied the determination with care I have no hesitation in concluding that Judge Cohen made material errors of law in dealing with the financial evidential requirements placed upon sponsors. It is abundantly clear that in support of the application from the appellants for entry clearances they had submitted documents to establish that the sponsor's income for the relevant period was over £ 24,000. These documents included the sponsor's tax return. It was therefore completely irrelevant that the sponsor's oral evidence was "vague, implausible and unconvincing". Further the Judge was manifestly wrong in stating that the requisite documentary evidence on income had not been submitted with the application and that the accounts filed by the sponsor should have been audited accounts. There is no requirement under the relevant provisions applicable to these appeals that the accounts filed should be audited. At one stage of the proceedings before me it was suggested by Mr Jarvis that the accounts filed were unsigned and therefore could not have been taken into account. However, he withdrew that submission after being shown that he was factually wrong in making that submission. I find that Judge Cohen made a material error of law in finding that the sponsor's documentary evidence on financial income did not show that he had met the financial requirement under the Rules. That finding in itself enables me to set aside the decision of Judge Cohen. Nevertheless, I will address the second ground upon which permission was granted - the principal appellant's failure to meet the requirement relating to English language. In that regard I find that the engagement of Judge Cohen with evidence relevant to this matter in terms of pleaded disability or mental health of the principal appellant was inaccurate in that he gave little or no weight to the medical evidence evidence relating to this matter. Judge Cohen in paragraph 13 of his determination

states that the appellant's submitted document from ESOL from City and Guilds had been investigated and found to be "unreliable". There is no document on my file to show that to be the case. The rest of the content of paragraph 13 of Judge Cohen's determination is somewhat incoherent and confusing. It is however the case that the principal appellant has not passed the listening element of the test. But as the Upper Tribunal Judge has stated in her decision granting permission, Judge Cohen failed to link the medical evidence with her ability to learn and pass an English test. With respect I agree with that view.

7. For the reasons given hereinbefore, having found material errors of law in the decision made by Judge Cohen I set aside his determination dismissing the appeals of the three appellants.
8. I remake the decision based on all the evidence that was before Judge Cohen and was placed before me by Mr Ahmed in a helpful manner in accordance with the directions given by Upper Tribunal Judge Lindsay. In so doing I took account of the skeleton arguments filed by Mr Jarvis for the respondent. I did not find this document of any assistance. The respondent produced no other documentation to resist the appellant's claims.
9. I find that at the date of the impugned decision the income of the sponsor to be meeting the relevant financial requirement had been satisfactorily evidenced by the sponsor. I accept the sponsor's witness statement in conjunction with his accounts filed by his accountant and his self assessment for HMRC in this regard.
10. I also find based upon the medical evidence which had been presented to the respondent and was also before the First tier Tribunal that the mental and physical ability of the principal appellant was such that she should have been allowed exemption from passing the remaining one element of the language test. I would therefore allow the appeals of all three appellants under the Immigration Rules.
11. If, however I am found to be wrong in my conclusion regarding the English language requirement in respect of the principal appellant, I have also considered her claim under Article 8 of the ECHR which as Upper Tribunal Judge Lindsay said was "strongly arguably unlawful". With respect I agree with Judge Lindsay's assessment.
12. I find for the same reason as she has set out in paragraph 8 of her decision that the interference caused by denial of entry clearance to the principal appellant is an unreasonable and disproportionate interference with her right to family life.

13. The principal appellant's relationship with the sponsor has been found to be genuine and subsisting and she suffers from ill health, needing the care, support and company of her husband and two very young kids in the United Kingdom. I have of course taken due account of the best interests of the children as a primary but not the only consideration in coming to that conclusion just as I have given due weight to the sponsor's length of residence in the UK as well as his unblemished record as a resident and citizen of this country. Further I have taken into consideration the speeches of Lady Hale and Lord Hodge in the case of R(on the applications of Ali and Bibi v Secretary of State for the Home Department [2015] UKSC 59 as reproduced in the appellants' skeleton argument. I have borne in mind that the right to family and private life is not absolute and that in the proportionality exercise I have taken account of whether the sponsor can reasonably be expected to live in Bangladesh to enjoy his life with his family. My answer to that question is in the negative. Promoting and protecting the rights of families to live together is a duty. It is not in the public interest to divide and separate families. For the avoidance of doubt I should make it clear that in addressing the Article 8 issue in these appeals I have followed the step by step approach enjoined by Lord Bingham in Razgar decision. Outcome in each case depends on its own particular facts and that it is extremely rare that two cases will have identical facts. Nevertheless, bearing in mind the principal that the outcome in each case will depend on its own facts, I have taken account of the relevant case law from the higher courts.
14. The appeals of all three appellants are therefore allowed and it is directed that in granting them entry clearances, due regard should be had for the three years that the appellants have had to wait get their claims resolved.

K Drabu CBE

Date: 29 February 2016

Deputy Judge of the Upper Tribunal.