



**Upper Tribunal  
(Immigration and Asylum Chamber)  
OA/07125/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 4 August 2017**

**Decision & Reasons  
Promulgated  
On 15 August 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**ENTRY CLEARANCE OFFICER - NEW DELHI**

Appellant

**and**

**ROHIMA KHATUN  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms Z Ahmed of the Specialist Appeals Team

For the Respondent: Mr M Aslam of Counsel instructed by Chancery Solicitors

**ERROR OF LAW DECISION AND REASONS**

**The Respondent**

1. The Respondent, to whom I shall refer as “the Applicant”, is a citizen of Bangladesh born on 10 May 1942. On 25 May 1982 she entered the United Kingdom with indefinite leave as a spouse. On 7 November 1982 she returned to Bangladesh and has not subsequently come back to the United Kingdom and there was no evidence she had previously sought to come back. By a letter of 10 February 2015 she applied through her then representatives for indefinite leave to enter as a returning resident. The

reason given for her failure to return to the United Kingdom within two years of leaving was:-

“Mrs Rohima Khatun’s husband, Mr Azmal Ali, lived with Mrs Rohima in Bangladesh and he had been ill for a long time in that Mrs Khatun could not come back to the United Kingdom within two years. Her husband was passed away in Bangladesh on 05.04.1999. Moreover, Mrs Khatun’s health condition was not good in that she could not come back to the UK in due course i.e. within two years. She was also engaged with her unmarried daughter. ... Though, she has been living in Bangladesh but she is depending on her children in the UK in all senses. ... Now, she is around 72 years old and has been living alone due to the death of her parents and husband. Her daughter is married and she has been living away from her in Bangladesh with her own family members in that she does not have anybody to look after her in Bangladesh. Her health condition has been deteriorated in the meantime. ... Her all sons, daughters-in-laws and grandchildren are living in the UK in that she needs to live with them smoothly in the UK. She needs intensive love and care in this late stage of her life. They also want her to return to the UK. They are not able to travel back to Bangladesh frequently to look after her and they cannot afford to stay with her in Bangladesh”.

### **The Entry Clearance Officer’s Decision**

2. On 18 March 2015 the Respondent (the ECO) noted the Applicant had been outside the United Kingdom for over 30 years and had not exercised a choice to return following her husband’s death in 1999. The ECO was not minded to exercise discretion under para.19 of the Immigration Rules which provides that even if a person is unable to meet the criteria of para.18 by reason only of having been away from the United Kingdom too long, he or she might nevertheless be admitted as a returning resident if, for example, she has lived here for most of her life. Accordingly the ECO refused the application under para.18 of the Immigration Rules and was not prepared to exercise discretion under para.19.

### **The Appeal to the First-tier Tribunal**

3. On 16 April 2015 the Applicant through her then representatives lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are lengthy and focus on her medical condition and her inability to live an independent life. The grounds refer to the two UK pensions she receives but go on to state that she is wholly and solely dependent on her family Sponsors in the United Kingdom. The grounds assert the Applicant satisfies the requirements of an adult dependent relative for entry clearance under the Immigration Rules. There are other references to human rights issues.

### **The First-tier Tribunal Proceedings**

4. By a decision promulgated on 6 December 2016 Judge of the First-tier Tribunal S Aziz allowed the appeal under the Immigration Rules by reference to para.19. This was a decision subject to the pre-Immigration Act 2014 regime but the Judge did not make any separate assessment of the human rights claim referred to in the grounds of appeal.
5. The ECO sought permission to appeal on the grounds that the Judge had not adequately taken into account the length of absence from the United Kingdom of the Applicant and the absence of any explanation why she had not sought earlier to return, particularly following the death of her husband in 1999. Her children had been born in Bangladesh and had subsequently moved to the United Kingdom as a matter of choice. The Applicant's daughter (unmarried at the time) could have accompanied the Applicant to the United Kingdom at a far earlier date. The grounds also question whether the Applicant was ever granted indefinite leave to remain and if she was not, then she could not avail herself of the benefit of paras.18 and 19 of the Immigration Rules. The grounds for appeal refer to the determination in *HY and FY (Returning resident - Meaning of ILR) Iran [2005] UKIAT 00055*. The grounds also refer to the visits made by the Applicant's family to Bangladesh and argue that it was unclear on what basis the Judge had found there were compassionate circumstances to warrant her being re-united with her sons in the United Kingdom: see paragraph 46 of the Judge's decision.
6. On 28 June 2017 Judge of the First-tier Tribunal J M Holmes granted the ECO permission to appeal. He noted that both parties were represented before the Judge in the First-tier Tribunal and commented that he was given little assistance or guidance since the Judge noted there was little case law: see paragraph 40 of his decision. Judge Holmes continued that the decision did not identify any case law whatsoever. It did refer to the Immigration Directorate's Instructions (IDI) of August 2004 but made no reference to the assistance that could be found in Macdonald's *Immigration Law & Practice* (9<sup>th</sup> Edition) paras. 4.27-4.32.

### **Proceedings in the Upper Tribunal**

7. There was no response filed for the Applicant under Procedure Rule 24. The Sponsor, one of the Applicant's sons, attended the hearing but in the event took no part.

### **Submissions for the ECO**

8. At the start, Ms Ahmad handed up the determination in *HY and FY* and accepted that there was no challenge to the original grant of indefinite leave to the Applicant. She relied on paragraph 9 of *HY and FY* set out in the ECO's grounds for appeal. The Applicant had left in 1982 and had not sought to return to the United Kingdom until the application leading to the decision under appeal. The evidence before the Judge showed the Applicant had not returned earlier by reason of choice and the Judge had erred in allowing the appeal.

## **Submissions for the Applicant**

9. Mr Aslam opened by submitting that *HY and FY* was not relevant to the appeal. In *HY and FY* the Applicant had left the United Kingdom while holding indefinite leave to remain and had returned as a visitor with a visit visa. The Applicant in this appeal had left with indefinite leave to remain in 1982 and had never subsequently returned and was seeking leave to return as a person with indefinite leave to remain.
10. That the Applicant had only lived in the United Kingdom for five months and that she had not chosen to return did not disclose any material error of law in the Judge's decision. The decision was comprehensive. There was no case law which was relevant. The only case law produced by the Respondent had been shown not to be relevant to the appeal. He referred to the IDI mentioned by the Judge. I pointed out that the IDI was at the date of the hearing before the Judge out of date having been updated on 19 November 2015. Mr Aslam correctly pointed out that there was little difference in the relevant parts of the IDI. The Judge was entitled to exercise the discretion under para.19 of the Immigration Rules and the grounds for appeal amounted to a mere disagreement with him.

## **Responses**

11. Ms Ahmad had no further submissions by way of response. I enquired if either party had submissions on the passage in Macdonald's Immigration Law & Practice mentioned in the Grant of Permission to Appeal: neither did. I noted, as already mentioned, that this was a decision subject to the pre-Immigration Act 2014 regime.

## **Error of Law Finding and Consideration**

12. It was accepted that the Applicant could not meet the requirements of para.18 of the Immigration Rules which include that she had not been away from the United Kingdom for more than two years. She therefore sought to rely on para 19 which states:-

"A person who does not benefit from the preceding paragraph by reason only of having been away from the United Kingdom too long may nevertheless be admitted as a returning resident if, for example, she has lived here for most of her life".

The IDI in force at the date of the ECO's decision so far as relevant is quoted in paragraph 35 of the Judge's decision. Caseworkers are instructed to consider the reason for the delay beyond two years, whether it was by choice or through no fault of the Applicant and whether she could reasonably have been expected to return within two years. They are instructed that the longer a person has remained outside the United Kingdom over two years, the more difficult it will be for her to qualify for admission under the discretion contained in para.19. There was no evidence to suggest that any of the other circumstances referred to in

para.2.1 of the IDI would or should have had any impact on the exercise of the para.19 discretion.

13. Given the clarity of the Rules and the IDI, I find that *HY and FY* is of limited relevance.
14. The Judge has not referred to the evidence that the Applicant had no choice but to remain in Bangladesh. There was no evidence before him when the Applicant's daughter married and what happened thereafter to prevent the Applicant seeking to return to the United Kingdom. There was no evidence before the Judge how family events were celebrated, whether the Applicant had wanted or sought to come to the United Kingdom to celebrate or mark the events but for stated reasons had not been able to, or whether the family returned to Bangladesh to celebrate or mark the relevant event.
15. There was no evidence of visits made by the family to Bangladesh, not even in the letter of 4 March 2015 from the Applicant to be found in the ECO's unpaginated bundle. There was no evidence before the Judge to support the assertion in the grounds of appeal that the Applicant's third son had spent over a year in Bangladesh helping her and that her younger son had visited. It is impossible to tell in whose passports the Bangladeshi visa stamps appear in the pages in the ECO's bundle or at page 21 in the Applicant's bundle. Page 21 is placed between copies of the bio-data pages of the passports of the Sponsor (page 20) and Md. Altab Hussain (page 22).
16. At paragraph 42 the Judge referred to the circumstances identified in the IDI but his analysis of the relevant facts is inadequate. At paragraph 44 his finding that the Applicant had not remained in Bangladesh out of personal choice is unsupported by reference to evidence beyond the insufficient evidence referred to at paragraph 42. There was no reference to any evidence before the Judge to support the conclusions at paragraph 46 which in part appears to rely on a finding of "compassionate circumstances" which are not referred to in para.19 of the Immigration Rules or the IDI and of which the Judge made no separate assessment.
17. A reference to compassionate circumstances might have been relevant in an assessment of the appeal under Article 8 of the European Convention outside the Immigration Rules. Any such consideration would have to take into account the manner in which the obligations imposed on the United Kingdom by Article 8 of the European Convention extend to persons outside the United Kingdom: see *Mundeba (s.55 and para.297(i)(f))DRC [20013] UKUT 88 (IAC)*. It is likely that such a consideration would need to look at the position of family members in the United Kingdom.
18. For these reasons, I have come to the conclusion that the Judge's decision failed adequately to set out sufficient factual evidence and reasons to support his conclusions in such a way that the ECO as the losing party would know why the decision was made in favour of the Applicant and against the ECO.

19. The effect is that the decision of the First-tier Tribunal contains material errors of law and is set aside in its entirety. None of the findings of fact of the First-tier Tribunal decision shall stand. It was clear neither party was ready to proceed to a substantive re-hearing and the appeal is remitted to the First-tier Tribunal for hearing afresh in accordance with Section 12(2) (b) of the Tribunals, Courts and Enforcement Act 2007 and paragraph 7.2 of the Senior President's Practice Statement of 10 February 2010 as amended.

**Anonymity**

20. There was no request for an anonymity direction and having considered the appeal I find none is warranted.

**SUMMARY OF DECISION**

**The decision of the First-tier Tribunal contained a material error of law and is set aside. The appeal is remitted for hearing afresh in the First-tier Tribunal.  
Anonymity direction not made.**

Signed/Official Crest

Date 14. viii. 2017

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal