



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/05867/2015

THE IMMIGRATION ACTS

Heard at Field House
On 30th April 2018

Decision & Reasons Promulgated
On 19th June 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

SHIPON BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A M Rahman of JKR Solicitors

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Rayner promulgated on 26 July 2017, in which the Appellant's appeal against the Respondent's decision to refuse her entry clearance to the United Kingdom dated 5 March 2015 was dismissed.
2. The Appellant is a national of Bangladesh, born on 10 May 1997, who made an application for entry clearance as a child to join her mother, Asma Khatun (the "Sponsor"), a British citizen, on 5 February 2015.

3. The Respondent refused the application on 5 March 2015 for the following reasons. First, the application was refused under paragraph EC-C.1.1(d) of Appendix FM of the Immigration Rules, by reference to paragraph E-ECC.1.6, for failure to meet the relationship requirements. The Appellant's father and sister made applications for entry clearance on 26 May 2014 which were refused on 5 August 2014. Previously the Appellant's two sisters and brother had made applications for entry clearance on 26 April 2012 which were refused and their appeals against the refusal were dismissed. The Respondent noted that there was no explanation of why the Appellant had not previously made an application with her siblings or father, or why her application was being pursued alone at this time. The application was refused on the basis that her father's application had also already been refused.
4. Secondly, the Respondent was not satisfied that the financial requirements in paragraph E-ECC.2.1 of Appendix FM had been met, the sponsor being required to demonstrate that she had earnings of £24,800 per year for the Appellant, her father and one sibling, which was not met for the reasons given in the refusal of the Appellant's father's application for entry clearance and which had not been addressed. In brief, that there was a failure to provide specified documents in relation to the Sponsor's employment; letters from employers were more than 28 days old; credits in the Sponsor's bank statement did not match payslips provided and that the Sponsor's income in 2013 was found to be half of what was then claimed, working for a company who had a negative net worth.
5. Finally, the Respondent stated that she had considered the best interests of the Appellant in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009 and her right to respect for family life under Article 8 of the European Convention on Human Rights, but that neither warranted a grant of entry clearance outside of the Immigration Rules.
6. Further to receipt of the notice of appeal, an Entry Clearance Manager reviewed the decision on 12 October 2015 and maintained it.
7. Judge Rayner dismissed the appeal in a decision promulgated on 26 July 2017 on all grounds. Specifically, given the refusal of the Appellant's father's application for entry clearance, the Appellant could not meet the relationship requirements for entry clearance as a child which was determinative of the appeal under the Immigration Rules. As such no determination was required on satisfaction or otherwise of the financial requirements, however if that was required, it was noted that there were no obvious discrepancies in the financial evidence provided in the Appellant's application that information satisfied the financial requirements in Appendix FM.
8. Separately Judge Rayner considered the Appellant's right to respect for family life under Article 8 of the European Convention on Human Rights, but found that the refusal was not a disproportionate interference with the right to respect for family life given the family decision for the Sponsor to relocate to the United Kingdom; the Appellant's failure to satisfy the requirements of the Immigration Rules and the public interest in the maintenance of immigration control. Reference was made back

to previous Tribunal decisions in relation to appeals against refusal of entry clearance by the Appellant's family members which were also dismissed on Article 8 grounds.

The appeal

9. The Appellant appeals on the following grounds. First, that the First-tier Tribunal erred in law in the interpretation and application of paragraph E-ECC.1.6(a) of Appendix FM which was satisfied by the Appellant, whose father had applied for entry clearance as a partner of the Appellant's mother.
10. Secondly, in the alternative, the Appellant did rely on paragraphs E-ECC.1.6(b) and/or (c) of Appendix FM on the basis that her father was unable to care for her due to his medical condition and for the same reason her mother had been solely responsible for her.
11. Thirdly, that the First-tier Tribunal erred in law in the assessment under Article 8, in failing to recognise that the application concerned long established family life with the Appellant's mother, without any pressure on public resources or strong public interest reasons for refusal, which would found a good claim under Article 8.
12. Permission to appeal was initially refused by First-tier Tribunal Judge Grant-Hutchinson on 26 January 2018 but later granted on all grounds by Upper Tribunal Judge Allen on 14 March 2018.
13. At the oral hearing, Mr Rahman on behalf of the Appellant submitted that paragraph E-ECC.1.6 of Appendix FM did not contain any requirement for the Appellant's father to have made an application of entry clearance at the same time as her, nor was there any requirement contained therein for such an application to be successful. The provision is drafted in very wide terms including reference only to a person to 'be applying, or have applied' for entry clearance. At the time of the Appellant's application for entry clearance, her father had applied and although the application had been refused, there was still a pending appeal against that refusal. It was submitted that this interpretation was supported by the refusal of entry clearance itself, as when the application was also refused for financial reasons, the requirements for three family members, two of which had already been refused, were taken into account. It was said that this shows that applications did not need to be made at the same time, nor did such an application need to be successful.
14. In relation to the financial requirements, the bundle showed that these had been satisfied with payslips and corresponding bank statement showing income above the required level, save for one payslip which was missing but had been submitted with the original application.
15. In the alternative, it was submitted that the paragraphs (b) and (c) should have been considered if (a) was not satisfied. It was accepted that the case was not expressly argued that way before the First-tier Tribunal, with the Sponsor acting in person, but the factual points had been raised in the Sponsor's written statement which identified her children as her husband's carer. Separately it is said that the entire

family is maintained by the Sponsor and there were indicators that she had sole responsibility for the children in these circumstances.

16. Finally, the decision under Article 8 was challenged as no actual findings had been made by the First-tier Tribunal and as the decision relied too heavily on previous decisions about other family members, not the Appellant.
17. On behalf of the Respondent, Mr Tufan submitted that the rationale behind the requirements in paragraph E-ECC of Appendix FM was that a child should not be left alone in the country of origin and envisaged that parent and child would travel together. On the Appellant's construction, any application by the parent, however unmeritorious and whenever made would satisfy the requirements in E-ECC.1.6(a) of Appendix FM. It was submitted that that cannot be a rational outcome and leaves the provision open to considerable abuse.
18. In relation to the alternative provision in subparagraph (b), it was submitted that the Appellant's father's medical condition could not be taken as having led to the abdication of all of his parental responsibility such that the Sponsor would have sole responsibility for the Appellant. On the facts there is clear shared parental responsibility and therefore the requirements in (b) cannot be satisfied.
19. Finally, in relation to Article 8, it was submitted that sufficient findings were made by the First-tier Tribunal Judge and there was no evidence of any unjustifiably harsh consequences to the Appellant which would be required to enable her to succeed under Article 8.

Findings and reasons

20. The first ground of appeal relates to the interpretation and application of paragraph E-ECC.1.6 of Appendix FM of the Immigration Rules. The relevant provision provides as follows:

E-ECC.1.6 One of the applicant's parents must be in the UK with limited leave to enter or remain, or be applying, or have applied, for entry clearance, as a partner or a parent under the Appendix (referred to in the section as the "applicant's parent") and

- (a) the applicant's parent's partner under Appendix FM is also a parent of the applicant; or*
- (b) the applicant's parent has had and continues to have sole responsibility for the child's upbringing; or*
- (c) there are serious compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care.*

21. Judge Rayner's findings in relation to the relationship requirement contained in paragraph 19 of the decision which states:

"Because Mr Uddin's application had been unsuccessful, the respondent is correct to point out that Shipon cannot satisfy the eligibility requirements. Had Mr Uddin's application or

appeal have been successful, Shipon would have been travelling with him to the United Kingdom, so would have satisfied E-ECC.1.6(a). However, as his application was unsuccessful, Shipon would have to satisfy either E-ECC.1.6(b) or (c). It is not suggested that she satisfied either of these provisions. Her father lives in Bangladesh and, although he is disabled, it is not suggested that Ms Khatun has sole responsibility for Shipon's upbringing or that there are serious or compelling family considerations which make exclusion undesirable."

22. It is not clear that the First-tier Tribunal was presented with any detailed arguments as to the interpretation or application of paragraph E-ECC.1.6(a) of Appendix FM and it is not therefore surprising that there is no detailed analysis of the nature of that provision or its application to the facts of the present case in the circumstances. Although this is now the main focus of the appeal before me, there remains a lack of any detailed argument or evidence in relation to the provision from either party. The Appellant's claim is based on a plain reading of the words, which it is submitted have no qualification as to the date of application or success of, in this case, the Appellant's father's application for entry clearance.
23. Although it was submitted by the Home Office Presenting Officer that the policy intention was that a child was not left alone in the country of origin without a parent and that the rules envisage that parent and child would travel together, there was no supporting evidence of the same, no reference to any policy guidance and no analysis of the wording of the provision itself. In these circumstances, I determine the first ground of appeal on the basis of general principles of construction together with reference to the wider provisions for entry clearance for children and the Respondent's guidance on the same.
24. The correct approach to interpretation of the Immigration Rules is set out by the Supreme Court in **Mahad v Entry Clearance Officer [2009] UKSC 16**, with reference to **Odelola v Secretary of State for the Home Department [2009] UKHL 25**. Lord Brown stated:

"[10] There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffman said in Odelola ... at [4]

"Like any other question of construction, this ... depends on the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."

Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The respondent's counsel readily accepted that what she meant in her written case by the proposition 'the question of interpretation is ... what the Secretary of State intended his policy to be' was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the

Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in Odelola (at [33]): ‘The question is what the Secretary of State intended. The rules are her rules.’ But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State’s intention to be discovered from [IDIs] issued intermittently to guide immigration officers in their application of the rules.”

25. Further, in Iqbal v SSHD [2015] EWCA Civ 169, Lord Justice Vos, when considering the interpretation of paragraph 41-SD of Appendix A to the Immigration Rules, confirmed what was said by the Supreme Court in Mahad and at paragraph 33 stated:

“[33] As Lord Brown explained, the court should properly have regard to the Secretary of State’s purpose and intention as discerned objectively from the words used. The court will also lean against an absurd construction, when the words in question can bear the preferred alternative meaning (see Jacob LJ in Lewis v Eliades [2004] 1 WLR 692 at paragraphs 58-61). But the court cannot and should not construe the Secretary of State’s Rules to mean something different from what, on a fair objective reading, they actually say. In this case, the two main construction points advanced respectively by Mr Iqbal and Mr Macdonald urge that result. I would hope that arguments of this kind will be less prevalent in the future.”

26. The natural and ordinary meaning of the words used in paragraph E-ECC.1.6(a) of Appendix FM is, as the Appellant contends, that there only needs to be an application made, at any point in time, and whether or not successful, for an applicant’s parent to join their partner. There is no express qualification as to when that application should be made nor whether it has to be successful. However, the intention behind the rules can not be discerned objectively from the natural and ordinary meaning of the words without leading to an absurd result.
27. As set out in paragraph GEN.1.1 of Appendix FM, the routes under Appendix FM are “for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection”.
28. Paragraph E-ECC.1.6 sets out three alternative scenarios in which a child may apply for entry clearance on the basis of family life with a person in the United Kingdom. On the Appellant’s construction these would be (a) where the applicant’s parent has been granted, has applied or intends to apply, at any time, to make an application for entry clearance as a partner, without more; (b) where the parent in the United Kingdom has sole responsibility; and (c) where there are otherwise serious compelling family or other considerations. It is absurd to suggest that there is a category in (a) which only requires an administrative hurdle compared to the substantive circumstances catered for in (b) and (c).
29. The Respondent’s construction of (a) that it is intended to be for a child to join or travel together with their parent to join the other parent in the United Kingdom, which the language is capable of being read as, does not lead to absurd results and

gives the requirement substantive meaning and greater consistency with the alternative categories in (b) and (c). I do not consider that this construction is for something different to what, on a fair objective reading, they actually say, particularly read in their wider context.

30. The Respondent's construction of (a) requiring the parent to be in the United Kingdom or applying for entry clearance to travel with the child is also consistent with the more express wording and structure of the similar provision in paragraph 297(1)(c), (e) and (f) of the Immigration Rules (where there are additional categories dealing with different substantive scenarios). Although the wording of the provision differs, the policy intention is clear on the face of both provision as to circumstances where the child of a person in the United Kingdom can apply for entry clearance.
31. Although as Lord Brown makes clear, the intention should not be discerned from the Respondent's guidance such as the IDIs, those issued in this case are consistent with the interpretation set out above. Specifically, decision makers are directed to grant a period of entry clearance in line with their (non-settled) parent (July 2012 IDI Chapter 8, Children, Section FM 3.1, paragraph 2.6), thereby the assumption is that they would be joining or travelling together with a person who had not just gone through the administrative process of applying for entry clearance but who had been granted it. That is also consistent with the Appellant's own application for entry clearance which expressly stated that she would be travelling with her father to the United Kingdom.
32. For these reasons, there is no error of law in the First-tier Tribunal's decision in finding that the Appellant could not meet the requirements in paragraph E-ECC.1.6(a) of Appendix FM because her father's application had been refused. The mere fact of his application was not sufficient on the correct interpretation of this provision.
33. As to whether the First-tier Tribunal should have in the alternative considered whether the Sponsor had sole responsibility for the Appellant or whether there were serious compelling or other family circumstances making her exclusion undesirable, the evidence before the Tribunal in the Sponsor's written statement was as follows:

"11. Universal Solicitors also advised that my children can apply without their father as I was solely responsible for them owing to my husband's disability. I am illiterate and have no idea how the law works. I had no choice but to rely on the advice that I received. I didn't understand how the children's application was presented.

12. My children were not being cared for by the father, because of my husband's medical condition he is in no position to look after them fully. My children are young carers and have been since I came to the UK in 2011."
34. The only other evidence relating to this point is a letter from the Appellant herself dated 20 June 2017 which refers only to her dad being disabled so that she and her siblings have been young carers.

35. It is accepted on behalf of the Appellant that her claim was not put to the First-tier Tribunal on the basis of paragraph E-ECC.1.6(b) or (c) of Appendix FM relating to sole responsibility or serious compelling or other circumstances but it was submitted that there was evidence which raised this point such that it should have been determined. I am unable to accept that the extremely brief reference to advice about sole responsibility and the father not being able to look after the children fully, sufficiently raises the issue such that it is an error of law for the First-tier Tribunal to have failed to determine whether the requirements in (b) or (c) were met.
36. In any event, even taken together, these extremely limited statements fall far short of the Appellant establishing that either (b) or (c) are met. There is no detail at all as to the Appellant's circumstances in Bangladesh and what care and control is provided by whom. Further, there is force in the Respondent's submission that the fact of the Appellant's father's medical condition (which existed at the time the Sponsor came to the United Kingdom) is such that it follows that he has abdicated all parental responsibility. The statement that he can not look after them 'fully' is, contrary to the Appellant's claim now, consistent with both parents continuing to have responsibility. Even if the failure to determine this point was an error of law (contrary to my findings above), it could not in any event have been a material error as in all the circumstances and on this very limited evidence, the First-tier Tribunal could not in any event have found that the Appellant had established that either E-ECC.1.6(b) or (c) applied.
37. The final ground of appeal is in relation to the decision on Article 8 of the European Convention on Human Rights. The findings on this point are contained in paragraph 25 of the decision as follows:

"As Shipon could not satisfy the Immigration Rules, I consider whether the decision was a breach of her human rights. On that matter, the question is whether the application of generally human-rights-compliant rules to an applicant has resulted, exceptionally, in a decision that disproportionately interferes with Convention rights. Both Judge Gibbs and Judge Stewart have considered this issue. Both have noted that it was Ms Khatun's decision to leave Shipon (and other family members) in Bangladesh that caused interference with Shipon's and the remainder of the family's private and family life. I have no doubt that it was the family's intention that they would be able to be reunited in the United Kingdom. However Article 8 does not give anyone the right to choose where they wish to establish family life. Given the family decision to support Ms Khatun to move to the United Kingdom; Shipon's failure to satisfy the requirements of the Immigration Rules; and the respondent's right to maintain immigration control, the ECO decision is not a disproportionate interference with Article 8 rights."

38. Although the reasons are short and rely on findings in relation to other family members about family life, it is impossible to see how, on the very limited evidence before the First-tier Tribunal, any other conclusion could have been reached in relation to Article 8, particularly in an entry clearance case. It is accepted that family life exists between the Appellant and her mother (as it also would between her and her father in Bangladesh) and that the decision maintains the interference with that

family life which began when her mother moved to the United Kingdom. The interference is in accordance with the law as the Appellant has failed to meet the requirements of the Immigration Rules for a grant of entry clearance and would be pursuant to the legitimate aim of the economic well-being of the United Kingdom though the maintenance of effective immigration control.

39. As considered by the First-tier Tribunal in the proportionately assessment, the public interest is given weight as is the family decision leading to the initial interference. There was no positive evidence submitted by the Appellant to add into consideration in her favour in the balancing exercise and it is clear she continued to enjoy family life in Bangladesh with her father and siblings, a place where she has spent her entire life. There was nothing to suggest the Appellant's circumstances were any different to those of her siblings whose claims had been refused on Article 8 grounds previously by the Respondent and by a First-tier Tribunal. In these circumstances, it is unarguable to suggest the facts would 'found a good claim' under Article 8. There is no error of law in the approach to considering the Appellant's claim under Article 8 nor the reasons given for its dismissal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed



Date

15th June 2018

Upper Tribunal Judge Jackson