



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08334/2018

THE IMMIGRATION ACTS

Heard at Field House
On 2 April 2019

Decision & Reasons Promulgated
On 17 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR NAZIR AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: The Sponsor Mrs Ahmed and her daughter Miss Ahmed
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision and error of law and directions issued on 4 March 2019 the decision of First-tier Tribunal Judge L K Gibbs was set aside by the Upper Tribunal. That decision is appended to this decision. The appellant, a citizen of Bangladesh born on 3 May 1949 had appealed to the First-tier Tribunal against the decision of an Entry Clearance Officer, dated 12 March 2018, to refuse the appellant entry clearance as a spouse.

Re-Making the Decision

2. In compliance with my directions the appellant's sponsor and his daughter had produced an index bundle of documents including but not limited to witness statements for both the sponsor, Mrs Selina Ahmed and her daughter Miss Tajbee Ahmed.
3. The evidence confirmed that the appellant and the sponsor married in November 1974 in Bangladesh when the appellant had worked at the Ministry of Foreign Affairs in Bangladesh. In July 1986 the appellant was posted to the Bangladesh High Commission in London where the appellant and sponsor moved with their two children. In 1994 the appellant was transferred back to Bangladesh but the sponsor remained in the UK with their children so that they could finish their education, the children and the sponsor spending their holidays in Bangladesh and the appellant visiting the UK. In 1998, the appellant took a post at the Bangladesh Embassy in Moscow which permitted more regular visits. In 2002 the appellant took early retirement and came to the UK and was granted indefinite leave to remain on 23 July 2003 and a copy of that letter was included in the bundle of documents.
4. In 2004 the appellant returned to Bangladesh to start construction of a five storey building in Dhaka to become the family's base in Dhaka (the appellant's daughter in evidence described it as their holiday home) together with apartments they could rent out. Various family members spent time in Bangladesh over the next few years and the sponsor made long visits to Bangladesh and during 2011/2012 both the sponsor and her adult children spent six months in Bangladesh to spend time with their husband/father. This was also the case in 2013. Due to the fact that the family were spending long periods of time in Bangladesh, the appellant did not need to visit the UK and his indefinite leave to remain lapsed as he had been out of the country for over two years. It was the family's evidence that as the appellant had never been refused a visa to the UK he did not think that letting the indefinite leave to remain lapse would have a significant impact.
5. However this has not been the case and although the appellant has applied for visit visas on a number of occasions these have been refused on the grounds that he would remain in the UK whereas when he applied for a settlement visa he was refused on the grounds that he would not settle. It is the family's case that they would now like to spend the majority of their time in the UK with regular visits to Bangladesh. It was the sponsor's consistent case that she has a flexible employment arrangement that allows her to take long periods of leave so that she can spend periods of time in Bangladesh with her husband. This evidence was supported by Miss Tajbee Ahmed.
6. Mr Bramble, at the beginning of the hearing on the basis of the evidence now before the Tribunal, conceded that the relationship requirements of Appendix FM under the Immigration Rules were met. I share that conclusion as it was patently obvious, even before hearing oral evidence that the appellant and the sponsor are in a subsisting marriage and intend to live together permanently. Although the appellant may have

submitted less evidence than was optimal to the Entry Clearance Officer when the application was first made I am satisfied on the balance of probabilities that the relationship between the appellant and sponsor is genuine and subsisting and that the appellant and the sponsor intend to live together permanently in the UK, notwithstanding they will continue to holiday in Bangladesh. I am satisfied that such holidays would not breach the requirements of E-ECP.2.10.

7. Although Mr Lindsay had conceded that the specified financial information had been submitted including of at least six months bank statements, it was Mr Bramble's submission that unfortunately, due to the nature of the sponsor's employment including that she had regular breaks to spend time in Bangladesh with her husband, she could not substantively meet the financial requirements of the Immigration Rules at the date of application (as required under Appendix FM).
8. That must be the case. I do not share the conclusion of the previous Immigration Judge in relation to the sponsor's employment. Although it is described by the employer as "casual" I accept, and Mr Bramble agreed, that what was meant by the letter from the Richmond and Wandsworth Councils is that the sponsor's employment is "flexible" to allow her to spend time with her husband with extended periods of leave where she does not get paid. However I accept, as did Mr Bramble, that when she is in the UK and if she were to work twelve months employment, her annual salary is £24,571 per annum. However, at the date of decision the payslips provided by the appellant for the sponsor show that her income at that time fell below the £18,600 per annum because of the time spent in Bangladesh.
9. The appellant made his application for entry clearance on 7 December 2017 and at that date the payslips for 2017 showed that the taxable pay as of 15 November 2017 was £10,684.03. The subsequent payslips for March 2018 shows that the total pay to date in the tax year was just £12,497. Although therefore I accept that the sponsor would normally earn well in excess of the specified gross annual income she had not at the relevant date for the appellant's application. In addition, and such was not disputed by the sponsors, although the bank statements showed some savings these did not reach the required level as set out in Appendix FM of specified savings.
10. Therefore I have to conclude that the appellant cannot meet the requirements of Appendix FM of the Immigration Rules as he did not, at the relevant date, meet the financial requirements.
11. I factor that finding, that the appellant does not meet the Immigration Rules, into my conclusions in considering the only appeal before the Tribunal which is a human rights appeal. It is not disputed by Mr Bramble and I accept and find that the appellant and the sponsor enjoy family life. It was Mr Bramble's submission that there was no family life in relation to the adult children. Although the adult children continue to live with their mother it was Mr Bramble's submission that this in itself does not demonstrate ties that go beyond normal emotional ties between adult children and their parents.

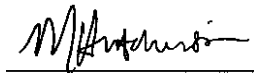
12. I accept however, that this family are particularly close and in my findings inter-dependent; there is some financial contribution from the adult children (and it was not disputed that the son of the appellant and the sponsor is married but still living with the sponsor and the sponsor's daughter in the UK). I am prepared to find that, given the closeness and interdependency including some financial dependency of the sponsor on her adult children and their continued cohabitation notwithstanding their age which goes beyond normal family ties, family life exists with the sponsor and her adult children. However I am not satisfied that that takes the appellant's case any further.
13. I find, as Mr Bramble accepted, that the entry clearance decision interferes with that joint family life. The decision is a lawful one and for the legitimate purposes of the maintenance of immigration control. I therefore go on to consider whether such a decision is proportionate. In so doing I must take into consideration the requirements of Section 117 of the Nationality, Immigration and Asylum Act 2002 Act and I have reminded myself that maintenance of immigration control is in the public interest and that the appellant did not meet the requirements of the Immigration Rules. I remind myself what was said by the Supreme Court in **R (on the application of MM Lebanon and Others) v Secretary of State for the Home Department** [2017] UKSC that the legitimate aim of the respondent in maintaining immigration control justifies the interference with Article 8 rights that the minimum income requirement implies.
14. Mr Bramble accepted that there was no other public interest other than immigration control and it was Mr Bramble's submission, which I accept, that the fact that the appellant had made a number of applications including both as a visitor and a spouse supported the genuineness of his case rather than the opposite in relation to the subsisting nature of the relationship.
15. Although the sponsor and her daughter gave candid and consistent evidence that the sponsor does not wish to move permanently to Bangladesh because of her adult children here and because of her job, that cannot amount to compelling or exceptional circumstances such that leave should be granted outside of the Immigration Rules (see including **R (on the application of Agyarko v Secretary of State for the Home Department)** [2017] UKSC 11). It has been the choice of this family to relocate in the way that they have including that the appellant has until now based himself in Bangladesh in recent years in order to construct the family's holiday house/investment in Bangladesh.
16. The sponsor and her daughter were straightforward and honest in their evidence that there were no health conditions and although I accept that the appellant may well be somewhat depressed because of his current inability to make a successful application to join his family, there was nothing before me that might warrant a finding of compelling circumstances. In my findings therefore the decision of the respondent to refuse the appellant's application is proportionate to the legitimate aim pursued and the appellant's Article 8 appeal cannot succeed.

17. However the helpful evidence submitted on behalf of the appellant indicates that the sponsor currently, in her employment this year, although she has not quite reached the level of £18,600 her total gross pay to date as at 15 February 2019 was £17,158.64. As Mr Bramble submitted, if she has continued in this employment in March 2019 it is very likely that she will have exceeded the £18,600 and therefore would be in a position to assist the appellant in making a further application where the financial requirements are met.
18. The findings of the Upper Tribunal, including that I am satisfied that this relationship is clearly genuine and subsisting and that the couple intend to live permanently together in the UK and that in a "normal" year where the sponsor does not take a break from her employment her income exceeds £24,000, may assist the appellant in any future application he seeks to make. Although entirely a matter for the appellant, as discussed at the hearing, it may well be that the appellant and the sponsor might benefit from expert assistance in compiling and submitting any further application that they may wish to make.
19. The decision of the First-tier Tribunal contains an error of law and is set aside. I remake that decision dismissing the appellant's appeal.

No anonymity direction was sought or is made.

Signed

Date: 15 April 2019



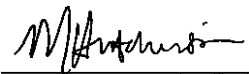
Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appeal is dismissed, no fee award is made.

Signed

Date: 15 April 2019



Deputy Upper Tribunal Judge Hutchinson

APPENDIX



IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08334/2018

THE IMMIGRATION ACTS

Heard at Field House
On 13 February 2019

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR NAZIR AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: The sponsor Mrs Ahmed and her daughter Ms Ahmed
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION ON ERROR OF LAW AND DIRECTIONS

1. The appellant is a citizen of Bangladesh born on 3 May 1949 who appealed to the First-tier Tribunal against the decision of the Entry Clearance Officer, dated 12 March 2018, to refuse the appellant entry clearance as a spouse. In her decision, considered on the papers and promulgated on 27 November 2018, Judge of the First-tier Tribunal L K Gibbs dismissed the appellant's appeal on all grounds.

2. The appellant, who continues to be unrepresented other than by the sponsor and by his daughter, appealed to the Upper Tribunal on the grounds that the judge has stated that the documentary evidence only covered three months whereas the appellant had provided eight months' payslips and ten months' bank statements and that other evidence, including photographic evidence and copy passports showing visits to Bangladesh, had been provided as well as a joint mortgage statement and evidence that the couple had two children together. The grounds also argued that the decision was "very unfair".

Error of Law Discussion

3. Although the respondent Presenting Officer did not have either the respondent's file or the documents which had been submitted by the sponsor in compliance with directions, following provision of this information by the Upper Tribunal, Mr Lindsay indicated that he was in a position to proceed with the error of law hearing.
4. Mr Lindsay conceded that from the information which had been submitted in the appeal it would appear that at least six months' bank statements had been submitted and he was prepared to accept that the judge had made an error on this.
5. Although it was initially mistakenly assumed that Mr Lindsay was therefore conceding the appeal, Mr Lindsay subsequently submitted that the real issue was set out at [9] of the decision and reasons as to the relationship between the appellant and the sponsor, the appellant's application having been refused on both financial and relationship grounds. The judge took into consideration that there was no narrative and it was Mr Lindsay's submission that this narrative was still missing and therefore even with copy passports, which Mr Lindsay did not dispute had been submitted on appeal, although not apparently considered by the judge, it was his submission that this would not have made a difference to the final decision.
6. I do not agree. This was a matter that had already been raised in correspondence by the First-tier Tribunal with the respondent in relation to missing documents. Despite this the First-tier Tribunal proceeded to reach a decision on the limited documents before it and specifically cited limitations in the documentation (when in fact additional documentation had been submitted on appeal which was not before the First-tier Tribunal). That was, in my view, procedurally unfair.
7. I considered Mr Lindsay's arguments, that the outcome would not have been different given the paucity of evidence on the relationship. However, it cannot be said, with certainty, that the judge's decision would have necessarily been the same, including in respect of the appellant's relationship with his wife, had the judge considered all the documents that were submitted by the appellant, including on appeal.
8. The decision of the First-tier Tribunal contains an error of law and is set aside. Although I was minded to remake the decision at the hearing before me, Mr Lindsay was concerned, including in relation to the manner in which the documents had been

produced and due to the lack of any evidence from the Entry Clearance Officer, that he was not in a position to proceed.

Notice of Decision on Error of Law

9. The First-tier Tribunal's determination contains an error of law capable of affecting the outcome of the appeal and is set aside. The decision on the appeal will be remade by the Upper Tribunal.

Directions

1. The Tribunal would benefit from a paginated indexed bundle of documents on behalf of the appellant, to be simultaneously served on the respondent, to be received no later than 14 days from the date of this decision. Such bundle to include all the evidence that the appellant and the sponsor wish to rely on to support the appellant's claim that he meets both the financial and relationship requirements of the relevant Immigration Rules (and the sponsors indicated that they would consider obtaining legal representation prior to the reconvened hearing). The bundle is to separately tabulate: (i) the evidence relied upon before the First-tier Tribunal; and, (ii) the additional evidence that it is now sought to rely upon before the Upper Tribunal.
2. It is anticipated that such evidence would include witness statements (for the sponsor and the sponsor's children together with a witness statement for the appellant) which should address the issues in dispute and referencing any documentary evidence relied on in particular to support the appellant's claimed relationship, as well as the claimed meeting of the financial provisions.
3. The respondent is to file and serve a full copy of the ECO bundle within seven days of this decision. The respondent is also to serve, seven days prior to the resumed hearing, any further evidence relied on in reply to the appellant's bundle.

No anonymity direction was sought or is made.

Signed

Date: 1 March 2019

Deputy Upper Tribunal Judge Hutchinson