Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21255/2018 (R)
HU/21259/2018

THE IMMIGRATION ACTS

Remote Hearing by Skype for Business	**Decision & Reasons Promulgated**
On 5th January 2021	**On 30th March 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR. SAMSUL HAQUE SALU (1)
MR. MONSUR ALOM (2)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Jafferji, Counsel instructed by Eurasia Legal Services (Birmingham)
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS (R)

1. The appellants are both nationals of Bangladesh. The first appellant is the husband of Lili Akther. The second appellant is their son. The second appellant was born on 1st July 2000. Lili Akther was issued with a Certificate of entitlement to a Right of

Abode in the UK and she arrived in the UK on 10th May 2017. On 24th June 2018 the appellants applied for entry clearance to the UK. Both applications were refused by the respondent for reasons set out in two separate decisions dated 14th September 2018. The appellants' appeals against those decisions were dismissed by First-tier Tribunal Judge Kemp MBE for reasons set out in a decision promulgated on 3rd September 2019.

2. For reasons set out in my error of law decision promulgated on 4th November 2020, I found the decision of Judge Kemp is vitiated by material errors of law and must be set aside. Although I was urged by the parties to remit the appeal for rehearing before the First-tier Tribunal, I noted in my error of law decision that no application had been made by the appellants in accordance with Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and in view of the narrow issues that remain to be determined, I directed that the appeal be listed for a resumed hearing for the Upper Tribunal to remake the decision.

3. The matter was listed for a resumed hearing before me on 5th January 2021. The hearing before me again took the form of a remote hearing using Skype for Business. Neither party objected. Neither the appellants, who are both in Bangladesh, nor their sponsor joined the hearing remotely. Mr Shuhag Uddin, a relative of the appellants and sponsor joined the hearing remotely. He had been called by the appellants as a witness before the First-tier Tribunal. I sat at the Birmingham Civil Justice Centre. I was addressed by the representatives in exactly the same way as I would have been if the parties had attended the hearing together. As before, I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

The background

4. As I have set out in my 'error of law' decision, the application made by the first appellant was refused because the respondent was not satisfied that the first appellant meets the eligibility relationship requirement, the eligibility financial requirement and the eligibility English language requirement set out in Appendix FM of the Immigration Rules. The application made by the second appellant was refused because the respondent was not satisfied that the second appellant is related as claimed to the individuals named as his parents on a birth certificate relied upon by the second appellant. Neither was the respondent satisfied that the eligibility relationship requirements set out in section E-ECC.1.6 of Appendix FM are met by the second appellant. Additionally, the respondent was not satisfied that the second appellant meets the eligibility financial requirement set out in Appendix FM of the Immigration Rules.

5. At the hearing of the appeal before the First-tier Tribunal, Judge Kemp heard evidence from the appellant's sponsor and two witnesses. He found the evidence to be credible and he was satisfied as to the genuineness of the claimed relationships between the sponsor and both appellants. He found that the marriage between the first appellant and the sponsor is a subsisting one and the relationship requirements set out in paragraphs E-ECP.2.1 to E-ECP.2.10 are met by the first appellant.

6. It was uncontroversial that the appellants were unable to meet the financial requirements set out in Appendix FM when the applications for entry clearance were made. Judge Kemp considered the evidence adduced at the hearing of the appeal and was satisfied that the sponsor has demonstrated she is now able to meet the financial threshold set out under the immigration rules.

7. The remaining requirement to be met by the first appellant for entry clearance was the English language requirement set out in paragraph E-ECP.4.1. of Appendix FM of the immigration Rules. The first appellant claimed that he is exempt from the

English language requirement because, at the date of application, he had a disability which prevents him from meeting the requirement. Alternatively, he claimed there are exceptional circumstances which prevent the first appellant from being able to meet the requirement prior to entry to the UK.

8. For the reasons set out in my 'error of law' I concluded decision Judge Kemp erred in his consideration of whether:

   a. The first appellant has a disability which prevents him from meeting the English language requirement.

   b. The second appellant's mother has had and continues to have sole responsibility for the second appellant's upbringing.

   c. There are serious and compelling family or other considerations which make exclusion of the second appellant undesirable and suitable arrangements have been made for his care.

   d. There are exceptional circumstances which would render the refusal of entry clearance, or leave to enter, a breach of Article 8 ECHR, because such refusal would result in unjustifiably harsh consequences for the appellants or another family member whose Article 8 rights it is evident would be affected by a decision to refuse the application.

Re-making the decision

9. The only ground of appeal available to the appellants pursuant to s84(2) of the 2002 Act is that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The burden of proof is upon the appellants to show, on the balance of probabilities, that they have established a family and/or private life, and that the refusal of leave to enter would interfere with that right. It is then for the respondent

to justify any interference caused. The respondent's decision must be in accordance with the law and must be a proportionate response in all the circumstances.

The issues

10. At the outset of the hearing before me, Mrs Aboni confirmed that the respondent accepts that the appellants are related to the sponsor as claimed. She also accepts that First-tier Tribunal Judge Kemp found that the financial requirements set out in the rules were met by the appellants at the date of the hearing. Mr Jafferji confirmed that it is common ground that the financial requirements were not met at the time of the application.

11. The parties agree that insofar as the requirements set out in the immigration rules are concerned, the only issue insofar as the first appellant is concerned is whether the English Language Requirement is met. If the English Language requirement is met by the first appellant, the second appellant's case is straightforward, because the second appellant was under the age of 18 at the date of application and it must follow that the relationship requirements set out in Section E-ECC.1.6(a) is met. However, if the English Language requirement is not met by the first appellant the Tribunal will need to consider whether the second appellant can satisfy the relationship requirements set out in Section E-ECC.1.6(b) and (c), or alternatively, can satisfy the requirements for indefinite leave to enter the UK set out in paragraph 297 of the Immigration rules. If the requirements set out within those rules are not met, the Tribunal will have to consider whether there are exceptional circumstances which would render the refusal of entry clearance or leave to enter, a breach of Article 8 ECHR, because such refusal would result in unjustifiably harsh consequences for the appellants or their sponsor.

12. As I set out in my error of law decision, there was no Notice provided by the appellants or their representatives under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 inviting the Tribunal to admit further evidence that was not before the First-tier Tribunal. After hearing submissions from the parties, I

reserved my decision and informed the parties that my decision would follow in writing. This I now do.

The submissions

13. Mr Jafferji relied upon a skeleton argument dated 5th January 2021. The first appellant relies upon the medical evidence from Professor Gopal Sankar Dey ("Professor Dey") and Dr Mesbah Uddin ("Dr Uddin") in support of his claim that he has a mental condition which prevents him from meeting the English language requirement. The appellants submit the respondent has not filed any evidence in response, and there is no reasonable basis for rejecting the medical evidence relied upon by the first appellant. The appellants submit the assessment of both doctors is very clear; the first appellant's condition means that he is not capable of studying for and passing an English language test due to problems with his memory. He has been advised to stay away from any activities that trigger stress and anxiety and in particular, to refrain from "any educational activities that might trigger the depression". The second appellant relies upon Section E-ECC.1.6.(b) and (c) of Appendix FM and paragraph 297(i)(f) of the immigration rules, and submits that in all the circumstances, there are serious and compelling family or other considerations which make exclusion of the second appellant from the UK undesirable. The appellants submit that if the requirements for entry clearance set out in the immigration rules are not met, there are exceptional circumstances which would render refusal of entry clearance, a breach of Article 8 ECHR and result in unjustifiably harsh consequences for the appellants and their sponsor, who would be affected by the decision.

14. Before me, Mr Jafferji referred to the letter relied upon by the first appellant from Professor Dey, a Professor of Psychiatry, that is to be found at page 149 of the appellant's bundle. He confirms the first appellant has been a patient of his and under treatment since 1st November 2014. He confirms the first appellant is suffering from "Recurrent Major Depressive Disorder", and he refers to the medication prescribed. He states:

> "I would like to say that this disorder has affected Mr Samsul Haque Salu's ability to remember or memories *(sic)*. Activities and instructions substantially. His memory has deteriorated to a stage that he will not be able to pursue any course of study or sit any exam. However, his ability to perform physical routine is not adversely affected by the illness or due to the impact of his medications. The assessment revealed that he is often frustrated and at a time very confused. This diseased also affects his daily routine activities like, disturb sleeping, reduce self esteem, less of interest in enjoyment and social occasion.
>
> My Recommendations:
>
> - stay away from anything that triggers stress and anxiety.
> - Refrain from any educational activities that might trigger the depression.
> - Take current medication until further assessment.
> - Participate in regular activities, family engagements and conversation."

15. Mr Jafferji confirmed that the letter encapsulates the medical evidence that is before the Tribunal and is supported by the other evidence before the Tribunal. He drew my attention to the manuscript prescription that is to be found at page 150 of the appellants' bundle which confirms the medication prescribed and referred to by Professor Dey. He also drew my attention to the letter from Dr Uddin, who is described as a 'Medicine Specialist' and 'Assistant Professor', dated 5th May 2019 that is to be found at page 151 of the appellants' bundle. Dr Uddin confirms that the first appellant "*is a patient of recurrent major depressive disorder and he is treated by Professor Dr Gopal Sankar Dey..*". He states:

> "I would like to say that this disorder has affected Mr Samsul Haque Salu's ability to remember or memories (sic) activities and instructions substantially. His memory has deteriorated to a stage that he will not be able to pursue any course of study or sit any exam. However, his ability to perform physical routine is not adversely affected by the illness or due to the impact of his medications. The assessment revealed that he is often frustrated and at a time very confused. This diseased also affects his daily routine activities like, disturb sleeping, reduce self esteem, less of interest in enjoyment and social occasion."

16. Mr Jafferji candidly accepts that the material part of the letter from Dr Uddin is a 'cut and paste' from Professor Dey, but he submits, that does not detract from the fact that he confirms the diagnosis made by Professor Dey and adopts it. The diagnosis of recurrent major depressive disorder is also referred to in a discharge summary that is to be found at page 153 of the appellants' bundle and finally, is

referred to again by Professor Dey in a letter dated 5th June 2019. In that letter Professor Dey states:

> "... Samsul Haque Salu attended in my surgery on Wednesday 5th of June 2019. He was reassessed and still to be found suffering from Recurrent Major Depressive Disorder. At present he is taking the following medication to manage his illness…
>
> …
>
> I also like to say that because of Major Depressive Disorder Mr Samuel Haque Salu's memory has been deteriorated and he is complying to take daily medicine but does not comply to performing day-to-day activities. I therefore would like to say that he is not able to pursue any course of study or sit any examination …"

17. Mr Jafferji accepts there was no evidence from the first appellant himself regarding his health and in particular, his inability to pursue any course of study or sit an examination. The sponsor had addressed the matter at paragraphs [21] to [23] of her witness statement dated 18th July 2019. She confirms that her husband has been suffering from recurrent major depressive disorder which has affected his ability to remember or memorise activities. She states:

> *"21. ... According to doctor report, is short and long-term memory has deteriorated to a stage that he will not be able to do any exam …".*

She refers to the letters from the doctors to support the claim made. Mr Jafferji maintains the respondent has not filed any evidence challenging the medical evidence relied upon and Professor Dey is clearly an eminent Professor of Psychiatry. His qualifications and experience to make the diagnosis is not challenged. He submits there was plainly active management of the appellant's condition as is apparent from the letter written in June 2019 which notes a change in medication. The report, albeit brief, was prepared by a specialist doctor who has been involved in the on-going care of the first appellant, to support an application for entry clearance and is therefore sufficient.

18. Mr Jafferji submits that if the English language requirement is not met, there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8. The first appellant refers to the delay on the part of the respondent in

permitting the sponsor to settle in the UK and his poor mental health, which, it is said, would clearly be adversely affected if he is not permitted to join his wife in the UK. It is said that the inability of the second appellant to join them in the UK would also have an impact upon the first appellant's mental health. Mr Jafferji submits that the result of refusing the first appellant's application, would inevitably be the inability of the family unit to unite in the United Kingdom, and will be disproportionate. He submits the family intended that the appellants would come to the UK together to be reunited with the sponsor. The four remaining children of the first appellant and the sponsor will remain in Bangladesh until such time as they are able to meet the requirements of the rules. The family intends to migrate to the UK as it is properly entitled to do so, following the sponsor having established a right of abode. The family could not all join the sponsor in the UK together because of the significant minimum income requirement that would have to be met. The first appellant and sponsor therefore made the decision that the appellants would come to the UK first, and once they are established as a family, there is likely to be sufficient income so that the minimum income requirement can be met, and arrangements can be made for the remaining children to make applications for entry clearance. Mr Jafferji submits that but for the significant delay in dealing with the sponsor's application for a right of abode, there would have been a longer period of time to ensure the requirements of the rules were met by the appellants.

19. As for the second appellant, Mr Jafferji submits serious and compelling considerations, include the factors that I have already referred to above, but also that the second appellant would be left in Bangladesh on his won, because of his father's inability to pass the English Language test. He submits that keeping the family together, in circumstances where the sponsor has established a right of abode is a compelling factor that weighs heavily in favour of this family. The stated intention of the family is that they will migrate to the UK and there is a significant risk that once the other children are able to join their parents, the second appellant will be left alone in Bangladesh separated from his family.

20. On behalf of the respondent, Mrs Aboni submits the first appellant has failed to establish that he is exempt from the English language requirement. The medical evidence that is relied upon by the first appellant is lacking in detail. She submits the initial letter from Professor Dey fails to identify how the diagnosis of 'Recurrent Major Depressive Disorder' was reached or to refer to any tests carried out to reach that diagnosis or identify any deterioration in the first appellant's mental health. She submits the letter lacks any detail as to why the appellant cannot pursue any course of study or sit any exam, notwithstanding the diagnosis referred to. Mrs Aboni submits the letter from Dr Uddin adds nothing and is simply a 'cut and paste' of what had been said by Professor Dey, without expressing an independent view, supported by reasons. Mrs Aboni submits the letter from Professor Dey dated 5th June 2019 provides no additional information, and there is no further up-to-date evidence either regarding the health of the first appellant or the financial circumstances of the sponsor in the UK. The appellants could not meet the financial requirements as at the date of application, but the First-tier Tribunal Judge found that the income requirement was met at the time of the hearing. However, there is no further evidence confirming the requirement is still met.

21. As for the second appellant, Mrs Aboni submits that the evidence does not establish that there are serious and compelling family or other considerations which make exclusion of the second appellant from the UK undesirable. There is very little information about the family's connections to Bangladesh. It is accepted by the appellants that the younger children of the first appellant and sponsor would remain in Bangladesh without their parents. There must therefore be some family support available to them in Bangladesh, and the second appellant would not find himself alone in Bangladesh. She submits family separation is not a sufficiently serious and compelling circumstance. It was the sponsor's choice to separate from her family and establish herself in the UK. There will be family separation even if the appellants are permitted entry to the UK because there are young children of the family that would remain in Bangladesh for the time being at least, and quite possibly, in the long term. There is, Mrs Aboni submits, nothing preventing the

sponsor living with her family in Bangladesh. The appellants cannot satisfy the requirements set out in the immigrations rules. There are, she submits, no other exceptional circumstances and the decision to refuse entry clearance cannot be said to be disproportionate.

22. In reply, Mr Jafferji submits that once it is accepted that the first appellant has a Recurrent Major Depressive Disorder, if follows that there is no reason to doubt the opinion set out in the letters from Dr Dey and Mr Uddin. There is no requirement for an expert's report of the type often produced in other proceedings or appeals. It simply has to be credible evidence.

23. Mr Jafferji submits the s55 duty to have regard to the best interests of a child apply when considering the proportionally assessment, and there is a need to safeguard and promote the welfare of the child. Here, the future impact upon the second appellant and the family as a whole, will be significant because of the risk of the second appellant being left separated from his family in Bangladesh. Mr Jafferji refers to paragraph [56] of the judgement of Underhill LJ, in HA (Iraq) v SSHD [202] EWCA Civ 1176 and submits that when considering whether refusal would result in unjustifiably harsh consequences for the second appellant *(for the purposes of Section GEN.3.2.(2) of Appendix FM)*, there is no reason why "unjustifiably" harsh consequences may not occur quite commonly. Finally, he refers to the judgement of the Court of Appeal in ECO (Mumbai) v NH (India) [2007] EWCA Civ, in which Sedley LJ, said at [22] and [23].

> "22. Ms Laing next relies on the decision of this court in Mahmood (ante) for the proposition that, at least if the content of Mr Halai's family life is reduced to his relationship with his mother, there was no insurmountable obstacle on the evidence before the adjudicator to its resumption in India, and therefore no interference with it by the refusal of leave to enter. The passage she relies on, which is in the judgment of Lord Phillips MR at §55(3), relates to the proportionality of interference under art. 8(2). But if one were to transpose it to the question which arises under art. 8(1) of interference with family life, it seems to me in the present context unarguable that keeping a son from joining his mother is any the less a want of respect for family life because the mother could instead join the son. In many cases it may well be relevant to show that, because there is no insurmountable obstacle to it, it is proportionate under art. 8(2) to expect the family member to go abroad in order to join or remain with the

> applicant. But the question has always to be answered in terms of art 8 and its jurisprudence (see Husna Begum v ECO, Dhaka [2001] INLR 115 , §21, per Pill LJ), and that in my view is what was done here by the adjudicator in relation to a fact situation which displayed few of the features familiar in removal cases.
> 23. If I am wrong about this and the adjudicator's decision that there was an interference with family life sufficient to engage art. 8(1) does not stand up in law, then I am in no doubt that the AIT's decision does. It is to be found at §31–32 (see above), and, while brief, makes it clear that this was a dependent son who had been living with and accommodated by his parents until they moved to the UK — the mother by right — in the expectation, or at least the hope, that he would be allowed to join them."

24. Mr Jafferji submits the sponsor has a right of abode in the UK and that is a factor that weighs in favour of the appellants when considering whether the decision to refuse entry is in all the circumstances, disproportionate.

Discussion

25. The appellants have appealed the respondent's decisions to refuse their application for entry clearance, under s82 of the Nationality, Immigration and Asylum Act 2002 on the ground that the decisions are unlawful under s6 of the Human Rights Act 1998. The appellant's must satisfy me on the balance of probabilities that Article 8 ECHR is engaged. If I find that it is, the burden shifts to the respondent to establish that the decision is proportionate. Although the appellants' ability to satisfy the immigration rules is not the question to be determined, it is capable of being a weighty factor when deciding whether the refusal is proportionate to the legitimate aim of enforcing immigration control. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the Secretary of State's side of the scales to show that the refusal of the claim could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules. Conversely, if the rules are not met, although not determinative, that is a factor which strengthens the weight to be attached to the public interest in maintaining immigration control.

26. It is not suggested by Mrs Aboni that the appellants do not enjoy a family life with the sponsor. First-tier Tribunal Judge Kemp heard evidence from the appellant's sponsor and two witnesses. He was satisfied as to the genuineness of the claimed relationships between the sponsor and both appellants. He found that the marriage between the first appellant and the sponsor is a subsisting one and the relationship requirements set out in paragraphs E-ECP.2.1 to E-ECP.2.10 are met by the first appellant. He found the second appellant is the son of the first appellant and the sponsor.

27. The appellants and the sponsor lived together in Bangladesh prior to the sponsor's arrival in the UK in May 2017. I find the appellants enjoy a family life with each other and the sponsor and Article 8 is plainly engaged. I find that the decision to refuse the appellants leave to enter has consequences of such gravity as to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved. The importance of, and weight to be given to immigration control has been underscored by Parliament in s117 of the Nationality, Immigration and Asylum Act 2002 (as amended).

28. In reaching my decision I have had regard to the evidence relied upon by the appellants that is to be found in the appellant's bundle comprising of some 189 pages, together with the letter from Professor Dey dated 5th June 2019 that my attention was drawn to. I have had regard to the evidence whether it is expressly referred to in this decision or not.

29. I have considered whether the requirements set out in the immigration rules are met by the appellants and having done so, I have reached my final conclusion by having regard to the appellants protected rights considered individually and collectively with the rights of each other and of the sponsor. In reaching my

decision, I have throughout had regard to the best interests of the second appellant as a primary consideration.

The immigration rules and the first appellant

30. It is useful to begin by considering whether the first appellant is able to satisfy the English language requirement set out in Section E-ECP.4.2 of Appendix FM of the Immigration Rules:

> E-ECP.4.2. The applicant is exempt from the English language requirement if at the date of application-
>
> (a) the applicant is aged 65 or over;
>
> (b) the applicant has a disability (physical or mental condition) which prevents the applicant from meeting the requirement; or
>
> (c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement prior to entry to the UK.

31. The first appellant is not over the age of 65 and for reasons I gave in my error of law decision, the first appellant is unable to establish that there are exceptional circumstances which prevent him from being able to meet the requirement prior to entry to the UK. The issue for me is whether the evidence relied upon, establishes, on balance, that the first appellant has a disability (physical or mental condition) which prevents him from meeting the requirement.

32. In her witness statement dated 8th July 2019 and her statutory declaration dated 23rd July 2018, Lili Akther confirms that her husband has been suffering from recurrent major depressive disorder which has affected his ability to remember or memorise activities. She provides no further information but simply refers to the medical evidence. I have considered whether and to what extent the letters before me from Professor Dey and Dr Uddin support his claim that he has a disability (physical or mental condition) which prevents him from meeting the English language requirement.

33. I am prepared to accept that Professor Dey is a Professor practising as a Psychiatrist at the Sylhet MAG Osmani Medical College and Hospital since 1992 and has the knowledge or experience to express a professional opinion. Dr Uddin does not set out his qualifications or experience, but I am prepared to accept that he is a 'Medicine Specialist' and 'Assistant Professor' and he too, is employed by the Sylhet MAG Osmani Medical College and Hospital. However, having considered the letters written by them, I attach little weight to the opinions expressed.

34. The letter from Professor Dey dated 19th June 2018 confirms the first appellant has been a patient of his and has been receiving treatment since November 2014. The letter does not provide any detail regarding the treatment that has been received by the appellant since November 2014. He goes on to say that "*After so many test I identified that he is suffering from Recurrent Major Depressive Disorder*", but does not identify the background to any symptoms, the tests that were completed, when those tests were completed, or when the diagnosis of Recurrent Major Depressive Disorder was made. Professor Dey does not identify the events or factors leading to the onset of the Recurrent Major Depressive Disorder that has been diagnosed and neither does he refer to any symptom or diagnostic criteria that he has adopted, in making the diagnosis. Similarly, although he confirms in his most recent letter that the appellant has been prescribed medication and complies with taking medication, he claims the first appellant "*does not comply to performing day-to-day activities*" and that the first appellant "*..is not able to pursue any course of study or sit any examination…*", without any further elaboration or explanation. He does not set out the day-to-day activities that the first appellant is not performing, or the reasons for that. Furthermore, he does not outline whether any other treatment has been considered such as psychotherapy or other lifestyle adjustments that could help ease the first appellant's symptoms. Without any further historical background, clinical information, information as to the symptoms described by the appellant or the tests undertaken to reach the diagnosis, it is difficult to understand how Professor Dey has reached his diagnosis, and more importantly, how the opinion

expressed that the first appellant is not able to pursue any course of study or sit any examination, has been reached.

35. I accept, as Mrs Aboni submits, the letter from Dr Uddin dated 5th May 2019 adds little. He simply confirms the first appellant is a patient of 'recurrent major depressive disorder and is treated by Professor Dey. The second paragraph of his letter is plainly, as Mr Jafferji was bound to accept, a 'cut and paste' from the letter written by Professor Dey dated 19th June 2018. Mr Jafferji submits Dr Uddin has adopted the diagnosis made by Professor Dey and adopted the opinion that the first appellant's memory has deteriorated to a stage in that he will not be able to pursue any course of study or sit an exam. The difficulty with that submission is that there is no indication in the letter that Dr Uddin, acting as an independent expert, agreed with Professor Dey, following his own review of the appellant's records or any independent examination completed by him.

36. True it is that the evidence of Professor Dey and Dr Uddin had been obtained to support an application for entry clearance, but that does not mean that expert evidence relied upon should fall short of the overriding duty of a medical expert, like any other expert, to provide independent assistance to the decision maker, and on appeal, to a Court or Tribunal. I acknowledge the First-tier Tribunal and the Upper Tribunal may admit evidence whether or not the evidence would be admissible in a civil trial, but even so, in the context of a medical report, the doctor's task is to assist the decision-maker determine the issue by bringing to bear his or her medical expertise, with an adequate explanation as to how any diagnosis has been reached and the reasons for the opinions expressed.

37. In my judgement neither Professor Dey nor Dr Uddin provide a critical and objective analysis of the symptoms displayed by the first appellant or explain the factual premise upon which the medical diagnosis and any prognosis is based, how, and from where the information is derived. As I have said before, the only other evidence regarding that issue before the Tribunal is what is said by Mrs Akther in her witness statement and statutory declaration, but her evidence on that

issue is extremely limited and she relies upon the letter from Professor Dey in particular. On balance, I find that on the evidence before the Tribunal the first appellant has failed to establish he has a disability (physical or mental condition) which prevents him from meeting the English language requirement.

The immigration rules and the second appellant

38. It is useful to set out the relevant immigration rules relied upon by the second appellant. The requirements to be met for entry clearance as a child are set out in Section EC-: Entry clearance as a child, of Appendix FM. Insofar as is material the Relationship requirements require:

> E-ECC.1.6. One of the applicant's parents must be in the UK with limited leave to enter or remain, or be being granted, or have been granted, entry clearance, as a partner or a parent under this Appendix (referred to in this 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 and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care

39. Alternatively, the second appellant relies upon paragraph 297 of the immigration rules:

> **Requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom**
>
> The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
>
> …
>
> (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care: and

…

40. It is uncontroversial that the second appellant's mother is in the UK. The second appellant currently lives in Bangladesh with his father and his four siblings. Although Mr Jafferji refers to Section E-ECC.1.6.(b), there is not a shred of evidence before the Tribunal that even begins to support a claim that the second appellant's mother has had, and continues to have, sole responsibility for the second appellant's upbringing. She does not make such a claim in her witness statement or statutory declaration. In fact her evidence is that the family lived together happily in Bangladesh prior to her arrival UK and their intention is to live together in the UK. For the avoidance of any doubt I find that the second appellant has not established that his mother has had and continues to have sole responsibility for his upbringing.

41. I must therefore consider whether there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care. The issue is the same regardless of whether it is considered under the prism of Section E-ECC.1.6.(c) of Appendix FM or paragraph 297(i)(f) of the immigration rules.

42. In Mundeba (s55 and para 297(i)(f)) [2013] UKUT 00088 (IAC), the Upper Tribunal confirmed that the exercise of the duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require. It said:

> "34. In our view, 'serious' means that there needs to be more than the parties simply desiring a state of affairs to obtain. 'Compelling' in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. 'Serious' read with 'compelling' together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be.
>
> …

> 37. Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come into play where there are other aspects of a child's life that are serious and compelling - for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social background and developmental history and will involve inquiry as to whether:-
>
> (i) there is evidence of neglect or abuse;
>
> (ii) there are unmet needs that should be catered for;
>
> (iii) there are stable arrangements for the child's physical care.
>
> The assessment involves consideration as to whether the combination of circumstances sufficiently serious and compelling to require admission.
>
> 38. As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC); [2012] Imm AR 939."

43. Even though the second appellant was a minor, albeit just shy of his 18th birthday, when he made his application for entry clearance in June 2018, there is no evidence before the Tribunal from the second appellant identifying the serious and compelling family or other considerations which make his exclusion undesirable. In her witness statement, Mrs Akther confirms that the second appellant is the eldest of her children and is studying in Bangladesh. She has exhibited letters from the Itauri Hazi Younus Miah Memorial High School, and Jamia Qasimul Uloom Kakordia Shewla Doksinvag Mewa to confirm the appellant has attended as a student and passed annual examinations. He has plainly been properly cared for and has been able to continue his education after his mother left Bangladesh. Although Mr Jafferji submits the overall circumstances here are such that there are serious and compelling family or other considerations which make exclusion of the second appellant undesirable, that broad submission is not supported by any evidence regarding the second appellant's circumstances in Bangladesh. I have no evidence before me as to what he is now doing, and why he could not continue his education and/or any employment in Bangladesh. He has the support of his father at present, and on the evidence before me, I reject the claim that he would be left alone in Bangladesh if his father and/or his siblings left Bangladesh. He is the eldest child of the first appellant and sponsor, and his four siblings were to remain

in Bangladesh if the appellants had secured entry clearance. That would only be possible if suitable arrangements were in place for the care of the second appellant's siblings, all of whom are younger than the second appellant. On balance, I am quite satisfied that there is a support network available to the family in Bangladesh, whether familial or otherwise, that the second appellant could turn to and would continue to benefit from.

44. On the evidence before me there is nothing to suggest that the first appellant has not played an active role in the upbringing of the second appellant or been unable to support the second appellant following his mother's move to the UK. The second appellant has lived in Bangladesh throughout and the first appellant has, I find, been providing perfectly proper and adequate care for the second appellant for a lengthy period. Although the letters before me from Professor Dey and Dr Uddin refer to the first appellant suffering from recurrent major depressive disorder, they do not say that the first appellant's mental health adversely impacts on his ability to care for, and to provide support to his children.

45. Looking at the evidence before me in the round, I find there is no evidence of neglect or abuse, there is no evidence of any unmet needs and I am quite satisfied that there are stable arrangements in place for the second appellant's care. I find the second appellant does not the requirements set out in the relevant immigration rules that are relied upon.

Appendix FM GEN.3.2

46. I have considered whether there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8 because such refusal would result in unjustifiably harsh consequences for the appellant and the sponsor. I accept the decision to refuse the first appellant entry clearance will undoubtedly have an impact upon his relationship with his partner. Similarly, I accept that the decision to refuse the second appellant entry clearance will have an impact upon his relationship with his mother. I do not have a statement from either appellant and

in her witness statement, Mrs Lili Akhter confirms that following their marriage, the family lived together happily in Bangladesh until May 2017 when she came to the United Kingdom having established a right of abode. She confirms there are five children of the marriage and that she has maintained regular contact with her husband and children since her arrival in the UK. She had planned to travel to Bangladesh in May 2019 to visit her husband and children after her husband was admitted to hospital, but that visit was unable to proceed because her passport was valid for a period of less than six months. Separation of a married couple or of a parent and child caused by an inability by one of them to secure entry clearance is likely to be 'harsh', but in this context I am not satisfied that the refusal of entry clearance results in unjustifiably harsh consequences for the appellants and sponsor. The first appellant remains in Bangladesh with the five children of the marriage and there is no evidence before the Tribunal regarding the family circumstances in Bangladesh. The letter from Professor Dey that is relied upon by the first appellant states the first appellant has been a patient and receiving treatment since November 2014. If that is correct, Mrs Akther moved to the United Kingdom knowing of the health of her husband. The letters from Professor Dey and Dr Uddin do not say when the diagnosis of Recurrent Major Depressive Disorder was made, and do not suggest that the separation of the first appellant from his wife is having an adverse impact upon the mental health of the first appellant. There is quite simply scant evidence before the Tribunal regarding the impact of the separation of the appellants from the sponsor.

47. I accept, as Mr Jafferji submits that the family intended that they will all, in the fulness of time, migrate to the UK but whilst that may have been their intention, they could not have any expectation that the appellants and the remaining four children would be granted entry clearance. The only expectation they can have had is that each application made to the respondent would be considered upon the facts and circumstances as they are when an application is made and will be determined by reference to the relevant rules and legal framework in place at that particular time.

48. In reaching my decision I have had regard to the best interests of the second appellant as a primary consideration. He was just shy of his eighteenth birthday when the application for entry clearance was made but is now over the age of eighteen. As a starting point, I readily accept that the best interests of a child are usually best served by being with both or at least one of their parents. The second appellant lived with both his parents until May 2017, and since then, he has continued to live with his father. The family dynamics changed when his mother moved to the UK having established a right of abode. He has lived in Bangladesh all his life and I am quite satisfied that he is familiar with the culture and traditions in Bangladesh. A move to the United Kingdom would enable him to reunite with his mother, but that would mean a change in the place of residence where he has grown up. Importantly, in my judgement, it would also result in separation from his father and his siblings, who at least at present, will remain in Bangladesh. The second appellant's reliance upon his mother is not as great as it would have been when she left Bangladesh in 2017. There is no evidence before me of any adverse impact upon the second appellant. It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. The assessment of what is in the best interests of a child is inherently fact sensitive and I must carry out the assessment on the evidence before me. In the end, it is in my judgement in the best interests of the second appellant to remain with his father and siblings in Bangladesh.

49. I have carefully considered whether the decision to refuse the appellants entry clearance is nevertheless disproportionate. The ultimate issue is whether a fair balance has been struck between the individual and public interest. In carrying out the balancing exercise, I have had regard to the delay in permitting the sponsor to settle in the UK. She applied for a right of abode on 14th October 2014. The application was refused but an appeal was allowed on 15th April 2016. She was granted entry clearance on 27th March 2017. Although there was plainly some unexplained delay, that delay has not impacted upon the appellants per se. The

sponsor arrived in the UK in May 2017. The appellants applied for entry clearance some 13 months later in June 2018. As Mrs Akhter accepts in paragraph [8] of her witness statement, there was some delay because she was unable to meet the minimum income requirement to sponsor the appellants. She confirms that she took all steps to sponsor them as soon as she had managed to get an appropriate job with the required salary and third-party support. The claim in the following paragraph that if she had been allowed to come to the UK when she applied *(i.e. in October 2014)* she would have been able to meet the financial requirement in good time to sponsor the appellants before the second appellant attained the age of 18, is nothing more than speculation. I am not prepared to speculate as to what the position may have been at some earlier point.

50. In reaching my decision, I have also had regard to the mental health of the first appellant, albeit the evidence before the Tribunal is in the vaguest of terms, and very limited. Finally, I also note that absent the English language requirement, the first appellant would have qualified for entry clearance in light of the other findings made by First-tier Tribunal Judge Kemp. Furthermore, it is likely that if the first appellant was able to meet the English language requirement, the second appellant would have succeeded.

51. In my final analysis and in carrying out the balancing exercise, I have also had regard to the respondent's policy as set out in the immigration rules. The appellants are unable to satisfy the requirements of the immigration rules for the reasons I have set out. I have also had regard to the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). I acknowledge that the maintenance of immigration control is in the public interest. The first appellant is unable to speak the English language. I acknowledge that s117B(2) Act provides that it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English because persons who can speak English – (a) are less of a burden on taxpayers, and (b) are better

able to integrate into society. I acknowledge that there is no English language requirement to be met for entry clearance as a child. Although there is force in the submission made by Mrs Aboni that there is no up-to-date evidence before me regarding the financial circumstances of the sponsor so that I can be satisfied that the minimum income requirement is met, I acknowledge and accept that First-tier Tribunal Kemp found that the eligibility financial requirement was met at the time of his decision promulgated on 3rd September 2019. Finally, as I have said before, the appellants remain in Bangladesh with the four other children of the marriage between the first appellant and sponsor and there is no evidence before the Tribunal regarding the appellants' circumstances in Bangladesh, the wider family in Bangladesh and the support that is available to them.

52. Having considered all the evidence before me in the round, and although I have accepted that the refusal of entry clearance will interfere with the appellants' family life and the family life of their sponsor, in my judgement, the interference for the purposes of the maintenance of effective immigration control, is proportionate, and it follows, lawful.

Notice of Decision

53. I dismiss the appeal is on the basis that the refusal of entry clearance does not breach section 6 Human Rights Act 1998 (based on Article 8 ECHR)

54. No anonymity direction was made by the FtT. There has been no application for an anonymity direction before me.

Signed *V. Mandalia* Date:18th March 2021

Upper Tribunal Judge Mandalia