



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: OA/03446/2014  
OA/03949/2014  
OA/03953/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 10<sup>th</sup> June 2015

Determination Promulgated  
On 13<sup>th</sup> October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ENTRY CLEARANCE OFFICER - DHAKA

Appellant

and

MRS. HAZERA BEGUM  
MR. ABU BAKKAR SIDDIK  
MR. ABU BAKKAR ARIK

Respondents

**Representation:**

For the Appellant: Mr. S. Whitwell, Home Office Presenting Officer  
For the Respondents: Mr. Z. Hussain of Novells Legal Practice

**DECISION AND REASONS**

**The Appeal**

1. This is an appeal by the Entry Clearance Officer against a decision of First-tier Tribunal Judge Colyer which allowed the appeals of Mrs. Begum and her two sons

against the decision to refuse entry clearance as the spouse and children of the Sponsor, Mr. Abdul Haque, under Appendix FM of the immigration rules.

2. Permission to appeal was granted on the basis that the judge arguably erred in finding that the maintenance requirements had been met, in particular in relation to the consideration of the Sponsor's income, paid in cash, and in having regard to evidence which predated the application by more than 28 days.
3. For the purposes of this decision, I refer to Mrs. Begum and her sons as the Appellants and to the Entry Clearance Officer as the Respondent, reflecting their positions as they were before the First-tier Tribunal.
4. The Sponsor attended the hearing. I heard submissions from both representatives.

#### Error of law

5. Appendix FM-SE (1)(n) provides:  
“(n) The gross amount of any cash income may be counted where the person's specified bank statements show the net amount which relates to the gross amount shown on their payslips (or in the relevant specified evidence provided in addition to the specified bank statements in relation to non-employment income). Otherwise, only the net amount shown on the specified bank statements may be counted.”
6. At paragraph [25] of the decision the judge states:  
“In his statement the Sponsor confirms that he is paid every week and deposits the money into his Barclays Bank account,  
“... however, occasionally, due to the fact that I receive the wages in cash, I tend to spend money on food, drink, pocket money and remittances before depositing the money. As a result the whole amount of wage after deduction of tax and NI is not deposited to the bank account as I already spent from that amount received from the employer.” ”
7. In paragraph [37] he finds:  
“I find that Mr Bramall's calculations have merit. He states “Taking the Respondent's six monthly figure of £11,400 this would equate to a monthly net salary of £1900. According to UK Tax Calculators.Co.UK this would equate to a gross annual salary of £25,843.80.” Mr Bramall has provided an extract from UK Tax Calculators.Co.UK. I am invited to take this as a true figure of Mr Haque's gross salary for the purpose of Appendix FM-SE. Certainly I considered this to be the minimum of his gross salary. As I have already indicated I do find that the wage slips are a true reflection of his real income but because of the Immigration Rules and the fact that he is paid in cash there are other considerations that have to be applied.”
8. In paragraph [38] he states:  
“I come to the conclusion that the Sponsor's gross annual income from cash meets the threshold when applying the Immigration Rules and the Respondent's policy.”
9. I found that the judge was only entitled by virtue of Appendix FM-SE (1)(n) to take into account the amount of cash paid into the Sponsor's bank account. It is clear that

this is not what he has done. It was an issue of which he was aware, as shown by paragraph [29]. In paragraph [36] he finds that the Respondent is disregarding the fact that the Sponsor has already paid tax and national insurance contributions, but this is not the point. The fact that the Sponsor is paid in cash, and that he does not pay all of this cash into his bank account, means that the only income that can be counted is the “net amount shown on the specified bank statements”.

10. I found that the judge had made a material misdirection of the law on the central issue of whether or not the Appellants met the financial requirements of the immigration rules. Accordingly I set aside the decision and proceeded to remake it.

### Remaking

11. The Sponsor did not give evidence. Accordingly the evidence I have taken into account is that contained in the Appellants’ and Respondent’s bundles, the same evidence as was before the First-tier Tribunal.

### Submissions

12. Mr. Hussain made submissions in relation to Article 8 only. He submitted that the first Appellant and Sponsor were committed to each other. The marriage had subsisted through difficult years of separation and the reason for this separation was beyond the control of the first Appellant and Sponsor. They had been married for 19 or 20 years and had “grown old together”. They only had each other and depended on each other to a “marked degree”.
13. If I were to find that there was no family life between them or that the Sponsor did not depend on his family to this degree, he submitted that a new application would divide the family owing to the age of the older son. It would only be possible for the Sponsor to make an application for his wife and youngest son to come to the United Kingdom and his oldest son would be left behind. The rules were very difficult for a 19-year-old child who had never been independent to come to the United Kingdom and he asked how that child would be able to cope on his own in Bangladesh. There were no facilities for young adults to be looked after by government organisations or charitable organisations in Bangladesh. He submitted that the eldest child would fall on hard times and would be without the guidance of his parents. In conclusion he submitted that in all fairness to the Sponsor the family should be allowed to come to United Kingdom for them to exercise their right to family life.
14. Mr. Whitwell submitted that the matter could not succeed under the immigration rules. In relation to Article 8 he submitted that the case had not been brought on Article 8 grounds and there was very limited evidence before the Tribunal to show the circumstances in which the family found themselves in Bangladesh. In the absence of evidence, he submitted that the Sponsor considered the status quo to be adequate and there were no contrary indicators for me to take into account. He submitted that the comments regarding the lack of assistance in Bangladesh for the eldest son should be ignored as there was no evidence. Article 8 had to be considered as at the date of decision and what might or might not happen in the future was not relevant. He submitted that family life had been continued in

different countries and Article 8 was not engaged, let alone interfered with. Should I find that there was an interference, he submitted that the decision was proportionate as the requirements of the rules could not be met. It was not possible for the tribunal to know what the position would be in the event of refusal, whether the Sponsor's wife would make an application or whether she would remain in Bangladesh.

15. In response Mr Hussain submitted that family life could not be exercised when they were separated by a 16 hour flight and six hours time difference. The time difference did not allow a proper family life. That's the family had been separated for so long but were still together was astonishing. The Sponsor had travelled twice to Bangladesh but it was very expensive. It was not feasible for them to continue family life in two different countries.

## Decision

### *Immigration rules*

16. I find that as only the net amount shown on the specified bank statements can be counted in calculating the Sponsor's income for the purposes of Appendix FM-SE, the Appellants cannot meet the requirements of the immigration rules. This was accepted by Mr. Hussain who did not address me on the immigration rules, but asked me to allow the appeal under Article 8.

### *Article 8*

17. This had not been considered by the First-tier Tribunal as the appeal had been allowed under the immigration rules, but it had been a ground of appeal before the First-tier Tribunal, and accordingly was accepted as being an issue before me.
18. I have considered the Appellants' Article 8 rights in accordance with the case of Razgar [2004] UKHL 27. I find that the Appellant and Sponsor were married in 1993. Their sons were born in 1996 and October 2007. On 14 February 2007, before the birth of his younger son, the Sponsor came to the United Kingdom, and has lived here ever since. I find that since 2007 they have chosen to conduct their family lives with the Sponsor in the United Kingdom, and the Appellants in Bangladesh. Given that the Sponsor's younger son was born after he came to the United Kingdom, I find that they have never lived as a family of four. However, I find that there is family life between the Appellant and the Sponsor for the purposes of Article 8, but that the decision does not interfere with this family life, and the way that they have chosen to conduct their family life for a period of almost eight years.
19. In case I am wrong in this, and the decision does constitute an interference with their family lives, continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being regular immigration decisions taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important

public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would not be significant and that it would be proportionate.

20. In assessing the public interest I have taken into account section 117B of the 2002 Act, so far as it is relevant. Section 117B(1) states that "The maintenance of effective immigration controls is in the public interest." There is a significant public interest in refusing permission to remain to those who have failed to establish a right to enter under the immigration rules.
21. In relation to the other relevant factors under section 117B, the application was not refused by reference to the English-language requirements (section 117B(2)). The Sponsor did not meet the financial requirements because of the way in which he dealt with his cash income (117B(3)). The First-tier Tribunal found that he earned a sufficient amount to meet the substantive requirements of Appendix FM-SE. These are only factors to be taken into account when considering all of the circumstances. On their own, a positive finding cannot tip the balance in the Appellants' favour.
22. I find that the level of interference would not be significant as family life can continue in the way in which it has done for the past eight years. I find that the Sponsor chose to come to the United Kingdom. In his witness statement at paragraph [7] he refers to the fact that they were separated "due to reasons beyond my control" but he does not explain what these reasons are. In his Sponsorship undertaking he sets out his immigration history in paragraphs [2] and [3]. He says that he first came to the United Kingdom in 1996 when he made an asylum claim "but did not follow this up". He applied for a work permit in about 2000. He states that he was issued with a work permit, but no leave was issued in his passport. He returned to Bangladesh, and entered in February 2007 with a newly issued work permit. There is no indication in this history as to why reasons beyond his control meant that he had to apply for a work permit in 2007. He has returned to Bangladesh twice, once in 2007, and once "about two years ago" (paragraph [7] of Judge Colyer's decision). There is no evidence before me to suggest that his decision to return to the UK in 2007 was not of his own choosing.
23. Mr. Hussain submitted that family life could not be exercised when they were separated by a 16 hour flight and six hours time difference. In that case, he must be accepting that there is no family life between the Sponsor and the Appellants given that that is the way in which they have conducted their lives for the past eight years. I do not think that this is what he meant, but in any event I find that these are the circumstances under which the Appellant and Sponsor chose to continue their family life. The decision does not interfere with this, and they can continue in the same way that they have done since 2007. As I have stated above, no reason has been given as to why the separation of the Appellants and Sponsor was beyond their control. The Sponsor came to United Kingdom in 2007 with a work permit, and no evidence has been provided to suggest that he came for any other than economic reasons.
24. It was submitted that the Sponsor and his wife had been married for 19 or 20 years and had "grown old together". Given that they have not been living together since

2007, and that prior to that the Sponsor spent time in the United Kingdom, first coming in 1996 according to his evidence, it is difficult to see how they have grown old "together". There is no evidence of them depending on each other to a "marked degree".

25. In relation to the older son, no evidence was provided to substantiate the claims of lack of support for him in Bangladesh, should his mother decide to make a fresh application to join the Sponsor. No evidence was provided to suggest that he would not have assistance from other family members or that he would not be able to be supported by the Sponsor. In any event, as an adult, he would be leaving the family home and living an independent life. Further, it is for the Sponsor and his wife to decide whether to make a fresh application for entry clearance with her youngest son, or to remain in Bangladesh. That is their choice. The fact that no application has been made until now indicates that they were content previously for family life to continue with them being separated from one another.
26. In relation to the younger son, as I have found above, given that the Sponsor came to United Kingdom before he was born, he has never had the presence of his father in his life in Bangladesh, apart from a visit about two years ago.
27. No evidence has been provided to show that family life cannot continue in Bangladesh. I find that the Sponsor can either choose to return to Bangladesh to be with his family, or he can make a fresh application for his wife and youngest son. Alternatively, family life can continue through modern means of communication and visits, as it has been doing.
28. When assessing the public interest, there is a significant public interest in refusing leave to enter to those who do not meet the requirements of the immigration rules. Taking into account all of the circumstances, I find that the Appellants have failed to show on the balance of probabilities that the decision is a breach of their rights, or those of the Sponsor, to family life under Article 8 ECHR, or indeed any other rights protected by the Human Rights Act 1998.

### **Decision**

The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.

I re-make the appeals, dismissing them under the immigration rules, and dismissing them on human rights grounds.

Signed:

Deputy Upper Tribunal Judge Chamberlain

Date: 9 October 2015