



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/23073/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 8 February 2018**

**Decision & Reasons
Promulgated
On 26 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

**MR AKIKUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ECO - NEW DELHI

Respondent

Representation:

For the Appellant: Mr P Ward, Solicitor of James & Co Solicitors
For the Respondent: Mr E Tufan, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant a national of Bangladesh, date of birth 1 March 1980, appealed against the ECO-New Delhi's decision of 28 September 2016 to refuse entry clearance. The matter came before First-tier Tribunal Judge

Rhys-Davies who on 22 September 2017 dismissed the appeal on human rights grounds as well as under the Immigration Rules against the refusal of entry clearance. Permission to appeal was given by First-tier Tribunal Judge Chohan on 1 November 2017.

2. The material argued before the Judge, it is accepted, showed that on a strict technical point with reference to Appendix FM-SE of the Immigration Rules HC 395 as amended the relevant payment of funds into the Sponsor's account were paid in fact to her sister, Miss Rabina Begum, who, as the evidence showed, transferred the monies directly to the Sponsor. The matter was put to the Judge that this financial arrangement was the direct decision by the DWP arising from their assessment of the Sponsor's abilities being unable to communicate.
3. Evidence was provided to the Judge of the clear position the DWP had taken and there was evidence also provided to the Judge that showed that the PIP payments for the Sponsor were paid to Mrs Rabina Begum who then transferred them the same day to the Sponsor.
4. The Judge followed the line that the evidence did not show the direct payment or PIP to the Sponsor and therefore the funds did not meet the Appendix FM-SE requirements.
5. As Mr Tufan rightly pointed out as Mr Ward had, the position was that there was no option for direct payment to the Sponsor by the system because that is how the DWP wish to process the matter. The position therefore is that it was not open to the Sponsor to alter the nature of the paperwork she had which demonstrated the receipt of the PIP funds provided to the Sponsor by the DWP as required by the Rules. The Sponsor for that reason alone could not comply with the requirements of the Rules and not only had not but was unable to avail themselves of any way in reality of forcing the payment was made direct to her.

6. I conclude that the Judge simply did not address that difficulty in the proportionality exercise that was undertaken thereafter. Rather the Judge seems to have misled himself into the view that because he could not resolve the issue of how the Sponsor was being treated that that therefore was irrelevant to the proportionality assessment which was essentially to be made. The case has many of the contextual bearing that comes from that of **Mostafa [2015] UKUT 146**. In that it is not for this Tribunal nor indeed the First-tier to resolve the issue of the requirements of the Rules. Simply it is clear that in looking at the proportionality assessment it is appropriate to take into account the extent to which there was compliance with the Rules and the propensity for someone to comply further if so required. In these circumstances I find the Original Tribunal made an error of law in failing to properly address the proportionality assessment.
7. The matter was not put to the Judge on the basis that there was as a fact a matter which he could resolve in relation to a breach of the Equality Act 2010 but rather the fact that the Sponsor's personal condition had the direct consequences on how the DWP treated her and it followed from that therefore that that was a material matter in assessing proportionality. Mr Tufan points quite properly to the case law and ultimately the issue of whether or not there were insurmountable obstacles in one sense is not ultimately to be resolved. Clearly it is open to this Tribunal to take into account whether or not difficulties can or cannot be remedied and in that respect **SS (Congo) & Ors [2015] EWCA Civ 387** (reference to be added) is material because quite simply the position is that the Sponsor's position could not be remedied. There are therefore compelling circumstances why Article 8 ECHR may be engaged [50-56].
8. In considering the issue of Article 8 ECHR the guidance and explanation of it now is perhaps best illustrated through the case of **Agyarko [2017] EWCA Civ 11** and I apply that approach being satisfied that this is a case where there are exceptional circumstances to look outside of the Rules because quite simply the difficulties have all arisen beyond the control of

the Sponsor or indeed the Appellant and the Rules do not accommodate that position. I therefore apply the cases of **Huang [2007] UKHL 11** and **Razgar [2004] UKHL 27** in assessing the issue of the steps and the question of proportionality. To that end it seems to me that the ECO's decision is an interference in the establishment of family and private life between the Sponsor and her husband the Appellant. It is a significant interference so as to engage Article 8(1) ECHR. I find that the Respondent's decision is lawful and properly served through the maintenance of the Immigration Rules for the purposes and intention of them.

9. Looking at the matter therefore with regard to the context of Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 it seems to me that there is nothing to suggest that the Appellant would be a burden upon the tax payer in the United Kingdom. He would at least on arrival be supported by the Sponsor. The Sponsor is in employment and she has a degree of independence and education which she has developed in the UK. Her circumstances in terms of her health and physical condition are unlikely to be changed and I note that there is no direct criticism of her as a potential burden upon the United Kingdom tax payers.
10. As to the Appellant's English language abilities he satisfied the requirements of the Rules and therefore I turn to whether or not looking at this matter in the round bearing in mind the Sponsor has a basis to remain in the United Kingdom it seems to me looking at the public interest which is an important matter which I obviously take into account that this is a case where the circumstances of the Sponsor are material to the consideration of proportionality.
11. I conclude having weighed the evidence and have regard to the statements of Rabina Begum and the Sponsor's father Mr Abdul Khalique as well as the supporting evidence from the Appellant in his statement that this is a case where the documentation and evidence shows a

genuine relationships that the parties to the marriage would wish to be together and that their continued separation is disproportionate. The public interest in this case which is one of those few that truly exists, is outweighed by the circumstances of the Sponsor and her husband the Appellant. For these reasons therefore I conclude in the light of the evidence that the appropriate outcome is that the appeal should be allowed on Article 8 ECHR grounds.

NOTICE OF DECISION

The appeal is allowed on human rights grounds.

No request was made for anonymity nor is one required.

Signed

Date 20 March 2018

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT

FEE AWARD

A fee award was paid but it seems to me that this is a case where the Respondent was correct in the decision that was made with reference to the Rules even though the outcome is disproportionate and this is not a case where a fee award is appropriate.

Signed

Date 20 March 2018

Deputy Upper Tribunal Judge Davey