



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: HU/01743/2020
HU/01747/2020
HU/01740/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 July 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

Samina Nasir Raja (First Appellant)
Uzaira Nasir (Second Appellant)
Raja Ali Nasir (Third Appellant)
(NO ANONYMITY ORDER MADE)

Appellants

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr Hingora, Counsel instructed by Sunrise Solicitors
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

Heard at Field House on 15 May 2023

DECISION AND REASONS

1. By my decision promulgated on 5 November 2021 I set aside the decision of the First-tier Tribunal. I now remake the decision.

Preliminary Matters

2. At a hearing on 12 December 2022, I considered whether the appellants were bound by a concession made in the First-tier Tribunal that the sponsor was domiciled in the UK when he married the first appellant. I gave a direction in my decision promulgated on 20 December 2022 that if the appellants wished to withdraw this concession they must make an application at least fourteen days

before the resumed hearing. No application was made and Mr Hingara stated that the appellants were now not seeking to withdraw the concession.

3. At the hearing on 12 December 2022 the respondent conceded that the financial eligibility requirement of Appendix FM was satisfied. I stated, as recorded in my decision promulgated on 20 December 2022, that the appeal would proceed on this basis. Mr Tufan stated that he would not have made this concession but accepted that it had been made and did not seek to reopen the issue.
4. I also stated at the hearing on 12 December 2022 that no findings of fact from the First-tier Tribunal decision were preserved.

Background

5. The appellants live in, and are citizens of, Pakistan. The first appellant and the sponsor married in Pakistan in 2002. Whilst the respondent does not accept that the first appellant and sponsor entered into a valid marriage, it is not disputed that they are, and have been, in a genuine relationship and that they have three children together. The three children are the second and third appellants, as well as their youngest child, Ayan, who is a British citizen. Ayan moved to the UK in 2020 to live with the sponsor.
6. On 26 July 2019 the appellants applied for leave to enter the UK in order to join the sponsor. At the time of the application, both the second and third appellants were under 18.
7. In a decision dated 14 October 2019, the respondent refused the application. Several reasons were given. First, it was not accepted that the first appellant and sponsor were married as at the time of their purported marriage in 2002 the sponsor was married to his previous spouse, who he divorced in 2004. Second, it was not accepted that the first appellant met the English language requirement in paragraph E-ECP.4.1 of Appendix FM because she had not passed an English language test to the requisite standard. Third, it was not accepted that there were exceptional circumstances which would render a refusal of entry unjustifiably harsh.
8. The appellants are appealing pursuant to Section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 on the grounds specified in Section 84(2) (the decision is unlawful under Section 6 of the Human Rights Act 1998).
9. The appellants argue, firstly, that their appeal should be allowed because they meet the conditions of the Immigration Rules, as set out in Appendix FM, to be granted an entry clearance as the partner (and children who were under the age of 18 at the date of application) of the sponsor.
10. The second (alternative) submission made by the appellants is that even if they do not meet the requirements of Appendix FM of the Immigration Rules, refusing them entry to the UK would represent a disproportionate interference with their family life (and the family life of the sponsor and Ayan) and therefore would violate Article 8 ECHR.

Findings of Fact

11. I heard oral evidence (through an interpreter) from the sponsor. I have also considered the written witness evidence and documentary evidence that was in the bundle of evidence before me. Based on the oral and written evidence, I make the following findings of fact:

- (a) The first appellant and sponsor are, and for many years have been, in a genuine relationship and have three children together. This was not in dispute.
- (b) The sponsor regularly visits his family in Pakistan and for a period of three years (between 2011 and 2014) he lived with the appellants in Pakistan. He stated during cross-examination that he lived with the appellants between 2011 and 2014 and this was not challenged by Mr Tufan. I have no doubt that this was a truthful statement, given that it was made without any appreciation of its significance. Accordingly, I find as a fact that the first appellant and sponsor cohabited for three years between 2011 and 2014.
- (c) The first appellant has failed an English language test five times, despite taking an English language course. There are two sources of evidence (both of which were unchallenged) indicating that the first appellant's failure to pass an English language test is due to an intellectual disability. The first is a letter dated 17 December 2021 from an institute where she studied the English language. The letter states that she studied there between 5 July 2017 and 27 September 2018 for the A1 level basic English speaking and listening test. It is stated in the letter that the first appellant took four three month courses, and had good attendance. It is stated:

"however, due to her learning difficulties, she failed the English language test on multiple occasions, five in total, despite the efforts she had made. The college also confirm that in its opinion, further classes would not be of much benefit as she has attended many classes in the past, but to no avail".

The second item of evidence is a report by a psychologist dated 8 July 2019. The report describes two tests performed, where the first appellant received a very low score. It is stated that the scores "reflect deficit skills in cognitive and adaptive behaviour skills". In a letter dated 31 August 2020, an associate clinical psychologist Ayesha Tariz (who is the practitioner who administered the tests described above), stated that the first appellant's scores "are suggestive of intellectual disability". She Stated:

"Based on the above results, [the first appellant] will most likely face difficulty in her communication skills, daily living skills and social interaction. She will not be able to perform on basic English language tests. However, she may improve with social skill and language training programmes."

In the light of this evidence, I am satisfied that the appellant has a learning disability and that this is the main reason why she has not managed to pass an English language test.

Analysis

12. It was common ground that in the light of the concession made by the respondent at the hearing on 12 December 2022 that the financial eligibility

requirements of Appendix FM were satisfied, the only two issues in dispute in respect of whether the appellants satisfy the conditions of Appendix FM are:

- (a) whether the sponsor and first appellant are “partners”, as defined in Appendix FM; and
- (b) whether the first appellant is exempt from the English language requirement pursuant to paragraph E-ECP.4.2.

13. Mr Tufan accepted that, given the concession on financial eligibility, the appellants would satisfy the requirements Appendix FM if these two conditions were met.

14. The term partner is defined in GEN.1.2 as follows:

GEN.1.2. For the purposes of this Appendix “partner” means-

- (i) the applicant’s spouse;
- (ii) the applicant’s civil partner;
- (iii) the applicant’s fiancé(e) or proposed civil partner; or
- (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix.

15. The respondent’s guidance “Family life (as a partner or parent) and exceptional circumstances” confirms that, with respect to GEN.1.2.(iv), the two year period of cohabitation does not have to have been completed immediately prior to the date of application. It states:

The 2-year period of living together for a couple who are not married or in a civil partnership must have been completed prior to the date of application. However, the 2-year period does not have to have been completed immediately preceding the date of application if, for example, the couple are currently living apart for work reasons in order to meet the financial requirements of the rules, provided that the relationship continues to be genuine and subsisting at the date of application.

16. As the sponsor and first appellant lived together for three years between 2011 and 2014, and were, and continue to be, in a genuine and subsisting relationship, the definition of partner is satisfied.

17. Paragraph E-ECP.4.2 provides:

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.

18. In the light of the evidence from the psychologist who assessed the first appellant and the letter from the institute where she studied English, I am satisfied that, on the balance of probabilities, the first appellant has a disability which prevents her from being able to pass an English language test.
19. Accordingly, I am satisfied that (1) the first appellant met the conditions under Appendix FM to be granted entry clearance as a partner at the time the respondent decided to refuse her application; and (2) the second and third appellants also met the conditions of Appendix FM because at the date of application they were under 18 (and not married or having formed an independent family of their own) and therefore their applications fell to be determined in line with that of the first appellant.
20. As the appellants have demonstrated that they met the requirements of the Immigration Rules when their applications were made and considered by the respondent, there is no public interest in excluding them from the UK. See paragraph 34 of *TZ (Pakistan) and PG (India) v SSHD* [2018] EWCA Civ 1109 (“where a person satisfies the Rules, whether or not by reference to an Article 8 informed requirement, then this will be positively determinative of that person’s Article 8 appeal, provided their case engages Article 8(1), for the very reason that it would then be disproportionate for that person to be removed”). I therefore allow the appeal under article 8 ECHR.
21. In the light of my finding that the Immigration Rules were satisfied and that this is positively determinative of the appeal, it has not been necessary for me to consider the evidence about the circumstances (and the best interests) of the children affected by the decision or other evidence relevant to proportionality under article 8 ECHR.

Notice of decision

I previously set aside the decision of the First-tier Tribunal. I now remake that decision by allowing the appellants’ appeal.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16.6.23