Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/13417/2018
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 March 2019	**On 15th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

KHANDAKER [B] – 1st Appellant
SH - 2nd Appellant
(Anonymity orders not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Swain of Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are both citizens of Bangladesh. The first Appellant who I shall refer to as the Appellant is the mother of the 2nd Appellant, SH. The Appellant was born on 2 January 1980. SH was born on 7 October 2002 and is now 16 years of age. They appeal against a decision of Judge of the First-tier Tribunal Geraint Jones QC sitting at Hatton Cross on 7 January

2019 in which he dismissed the Appellant's appeals against decisions of the Respondent dated 7 June 2018. Those decisions were to refuse the Appellant's application for leave to remain on the basis of their family and private life in the United Kingdom because she could not meet, inter alia, the suitability requirements of Appendix FM. She had employed a proxy test taker on 6 March 2013 and she and her children could relocate to Bangladesh.

2. The Appellant entered the United Kingdom on 8 September 2009 with valid leave as a Tier 4 (General) student valid until 28 February 2011. On 21 February 2011 the Appellant applied for a further tier 4 student visa which was granted until 26 January 2014. This was extended until 30 August 2014 but an application made on 7 August 2014 for a Tier 2 (skilled worker) visa was refused on 16 October 2014. An appeal against that decision was dismissed and the Appellant's appeal rights were deemed exhausted on 23 September 2015. On 3 November 2015 she applied again for a Tier 2 (skilled worker) visa but this was voided by the Respondent on 29 November 2016. By then the Appellant had made her application on 20 April 2016 the refusal of which has given rise to the present proceedings.

3. SH arrived in the United Kingdom on 29 February 2012 having previously been left in Bangladesh when the Appellant came to the United Kingdom in 2009. Whilst in the United Kingdom the Appellant gave birth to two further children: L on 1 August 2012 who is now 6 years of age and A born 12 May 2017 who is now one year of age. None of the three children of the Appellant were qualifying children within the meaning of the Immigration Rules and the Nationality, Immigration and Asylum Act 2002, at the date of the hearing before the First-tier.

The Appellant's Case

4. The Appellant resides with her husband who is also a citizen of Bangladesh and has no lawful immigration status. Neither the Appellant nor her husband work and the family lives on help from friends and other family members. Contrary to the claim of the Respondent the appellant took an English language test herself on 6 March 2013 and duly passed it. Each of the children are familiar with the lifestyle in the United Kingdom and their welfare and development would be seriously hindered if any of them were required to relocate to Bangladesh even if that was as a family unit. The children would be at a disadvantage in Bangladesh because they could only speak and understand Bengali "to an extent". At home the entire family conversed in English. The Appellant relied on a report from Ms Diana Harris an independent social worker. She stated that a move would cause disruption to the children's studies and unwanted change in the children's lives would have deleterious effects on them.

The Decision at First Instance

5. At [29] of his determination the Judge set out his findings of fact noting that neither the Appellant nor her husband had any immigration status in

this country. The Appellant had chosen to remain illegally in the United Kingdom since losing her appeal in the Tribunal in 2015. The family members conversed between themselves in Bengali and SH could speak and understand that language. He had undoubtedly used that language until he came to the United Kingdom when he was 9 years of age. The family wished to continue residing in this country even if it involved illegality. The family lived in unsatisfactory housing with only one bedroom and were maintained by the earnings of the Appellant's husband in what the Judge described as "the grey market". He rejected as untruthful the evidence that the family was maintained by the generosity of friends or relatives. The Appellant's husband would be able to enter the labour market in Bangladesh and provide for his family there. The Judge rejected evidence of the cost of education in Bangladesh.

6. The Judge directed himself that he was obliged to apply the decision of the Supreme Court in **KO [2018] UKSC 53**. The question whether or not it was reasonable to expect a child to leave must be seen in the entire factual context not judged in some artificial vacuum. That was not to blame the children for the sins of their parents who had chosen to flout the immigration laws of this country. The issue of powerful reasons being required where qualifying children were involved did not arise in this case because none of the children were qualifying children. There were no exceptional compelling circumstances requiring the appeal to be allowed outside the immigration rules. SH would be departing at the very least with his own mother and as a matter of probability with his entire family unit. He would be able to continue his education in Bangladesh along with having the satisfaction of growing up in and contributing to the country of his nationality. No significant obstacles to relocation were identified.

7. The Judge rejected the evidence of Ms Harris having considered it at [22] to [27] of his determination. He noted that the report did not give particulars about the nature and extent of what was said to be a strong support network for the family. Ms Harris could not confirm what educational facilities would be available for the Appellant's children in Bangladesh. A move would cause disruption, that was simply a matter of common sense not expertise. There was no comparison made about what the family's relative circumstances might be in Bangladesh compared to the unsatisfactory accommodation of one bedroom they currently had in the United Kingdom. It was speculation by Ms Harris that if the Appellant's children went to Bangladesh the impact of grief at the loss of their current home, school, friendships and bonds would have a detrimental impact on their emotional well-being. Ms Harris had argued that they might entertain negative feelings such as resentment, behavioural issues, anxiety, eating disorders, self-harm, feelings of sadness and depression. The Judge commented at [24] that Ms Harris' evidence "falls well short of persuading me that it is more probable than not that any of those consequences would flow". He dismissed the appeal.

The Onward Appeal

8. The Appellants appealed against that decision arguing firstly that the Judge gave inadequate reasons for finding the Appellant had been dishonest in the matter of the English language test. The ultimate issue in relation to the English language test was whether the legal burden of proving dishonesty was discharged by the Respondent. The Appellant had proffered an innocent explanation which met the basic level of plausibility.

9. The 2nd ground argued there been a flawed approach to Appendix FM and the assessment of the children's best interests. The Judge had not struck a fair balance when considering Article 8 and the proportionality assessment. The grounds referred to the Respondent's policy guidance dated October 2017 [which in fact has been superseded since the Supreme Court decision in **KO]**. The Judge was required to consider as a primary consideration the best interests of the children rather than what was reasonable. What mattered was the substance of the attention given to the overall well-being of the child. It would be unjustifiably harsh to require the Appellant and her minor children to leave the United Kingdom.

10. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Hollingworth on 8 February 2019. In a grant of permission to appeal which was not always easy to follow and which concentrated almost exclusively on the English language test issue, he found it arguable that the Judge had imposed too high a test at [20] when considering whether the evidential burden had shifted. I pause to note here that [20] was where the Judge had considered that the evidence adduced by the Appellant was not sufficiently cogent or reliable to lead to the conclusion that it had displaced the prima facie position relied upon by the Respondent in relation to the English language test.

11. The grant continued by saying that it was arguable that the other credibility factors referred to by the Judge had attracted too much weight. It was arguable this led to the rejection of the evidence adduced by the Appellant in the context of the shifting of the evidential burden. The Judge had taken into account adverse credibility findings at [29] where he had referred to the Appellant having chosen to remain in the United Kingdom illegally. It was unclear to what extent this factor had attracted an adverse credibility finding undermining the nature and quality of the explanation put forward by the Appellant. Credibility findings set out at [29] included a specific finding that the Appellant had taken her English test in March 2013 by proxy and thereby acted fraudulently. The Appellant's witness statements on the point were insufficiently analysed by the Judge at [18].

12. The grant continued: "It is arguable that distinctions exist between the elements referred to in terms of the test applied and that the scope of plausibility in relation to the explanation provided by the Appellant should first be approached on the footing of the nature, extent and quality of the explanation in relation to those matters raised in the statements relied upon by the Respondent in contradistinction to the more general findings of credibility which are in any event arguably affected in the manner referred to". Finally, in one sentence at the very end of his decision to

grant permission Judge Hollingworth wrote: “it is arguable that the proportionality exercise has been affected”.

13. The Respondent replied to the grant of permission pursuant to Rule 24, arguing that there were no arguable errors of law in the determination. That the Appellant could speak English did not mean she had not employed a proxy test taker.

The Hearing Before Me

14. In consequence of the decision to grant permission to appeal the matter came before me to determine in the first place whether there was a material error of law in the determination such that it fell to be set aside. If there was not then the decision at first instance would stand.

15. At the outset of the hearing both advocates raised two issues with me. The first was that SH was now a qualifying child having been in the United Kingdom for more than 7 years, SH having arrived in United Kingdom on 29 February 2012 just over 7 years ago. Counsel submitted that this information was for background only. I indicated that as this was at error of law stage the appeal fell for decision on the facts as they were at the date of the hearing at 1st instance. On 19 March the Upper Tribunal received an e-mail with attachments from the Appellant’s solicitors which purported to raise a new matter under section 120, namely that SH was now a qualifying child. I did not receive this communication myself until after the hearing but in view of counsel’s concession and my ruling that I was only concerned at error of law stage with the facts as they were before Judge Jones QC the e-mail from the Appellant’s solicitors did not, in any event, take matters any further.

16. At the hearing I was informed that there was also a development in relation to the English language test which counsel stated was not presently relied upon by the Appellant. The Appellant’s representatives had told the Respondent that they had now heard what was said to be the recording of the Appellant’s English language test but it was not the Appellant’s voice on the recording which had been supplied to them. Another of the attachments to the e-mail from the Appellant’s solicitors, mentioned that the Appellant had received an audio recording of her TOEIC test but did not mention that it was someone else’s voice on the recording. Again, as with the 7-year qualifying child point, the e-mail did not affect the error of law stage.

17. I observed to the parties that in his grant of permission, Judge Hollingworth had concentrated almost exclusively on the issue of the English language test which was the focus of the hearing before me. The appeal proceeded and the first point made on behalf of the Appellant was that the Judge was wrong to say that the Appellant had only given scant details regarding her taking of the English language test. She had made two witness statements on the 2 and 7 January 2019 and had said how she had prepared for the test, referred to the day in question and the setup of

the room. There would be CCTV images of the test centre on that day and they could be checked to confirm that the Appellant attended the test centre. If the Judge was not satisfied with this evidence and did not consider that it provided an innocent explanation, he should have given proper reasons why the Appellant's evidence was not accepted but that was not done.

18. The Judge had referred to what he described as the Appellant and her husband's poor immigration history but counsel argued that that was not correct, rather the Appellant had a good immigration history. I queried this with counsel since it was evident that the Appellant had had no leave to remain in United Kingdom since 30 August 2014, almost five years and her husband likewise. Counsel argued that this was not an Appellant who had evaded the attention of the authorities but who had made a number of applications within time albeit they were unsuccessful.

19. There were other points in the determination in issue. At [7] the Judge had referred to the Appellant's evidence that the family was supported by unspecified friends and unidentified family but no evidence of any such financial support had been forthcoming. At page 328 of the Appellant's bundle details of these charitable friends were set out. There had been no proper enquiry by either the Respondent or the Judge of the exact nature of the Appellant's stay in the United Kingdom since she had arrived here in 2009. The Judge had attached undue weight to what he referred to as the Appellant's poor immigration history. However, it was not the case that the family were splitting their immigration applications for maximum tactical advantage as the Judge had suggested at [42].

20. Closer examination would have revealed that after the Appellant's Tier 4 application had been granted in 2013 the Appellant's husband had appealed because his application as her dependent had been refused. That appeal was unsuccessful. He was not named in the Appellant's subsequent points-based system application under Tier 2 which was refused in October 2014. At this point the presenting officer interjected to explain that on 3 June 2015 the Appellant's husband's appeal was dismissed. Counsel continued that the husband then made his own human rights application in August 2015 at which time the Appellant was still in the middle of challenging her Tier 2 2014 refusal. That was why the applications were split between the Appellant and her husband, it was not tactical.

21. In reply the presenting officer submitted that there was no material error of law in the First-tier Tribunal's decision. The grounds were a disagreement with the Judge's findings. At [18] the Judge had dealt with the Appellant's evidence of how she was said to have taken her English language test. The Judge's conclusions on this evidence were open to him. The Judge was entitled to take notice of the number of years the Appellant had lived in the United Kingdom without any leave. The reference to other people supporting the Appellant and her family was merely an argument as to the weight to be ascribed to that evidence. The Judge had assessed

everything. At [29] the Judge set out his findings of fact and explained why he found relocation to be reasonable.

22. In conclusion counsel argued that the Respondent had "taken up the baton" by overemphasising and interpreting unfairly the immigration history of the family as the Judge had done. In the rule 24 response the Respondent had referred to a "breath-taking disregard" of immigration rules by the Appellant but the immigration history did not bear that out.

Findings

23. The appeal in this case is essentially a reasons-based appeal against the adverse credibility findings made by the Judge when dismissing the Appellant's appeal. The primary focus of the appeal is on whether the Judge was correct to find that the Appellant could not provide an innocent explanation for the allegation that she had employed a proxy test taker for her English language test in March 2013. The Judge was aware of the Appellant's claim that she had taken the test but pointed out specifically that the Appellant had sought to revise the contents of her 1st witness statement of 2 January 2019 in her 2nd witness statement of 7 January 2019. The Judge's characterisation of the details given by the Appellant for the tests that she attended on 6 and 18 March 2013 was that the evidence was scant.

24. As counsel acknowledged in submissions to me, the Tribunal was concerned about the spoken language test. It was a matter for the Judge to consider whether the evidence provided by the Appellant of her test was plentiful, sufficient or scant. To say that the Judge was wrong to characterise the evidence as scant is to make a submission that the Judge's fact-finding was perverse. That, I remind myself, is a very high threshold to cross and I do not accept that either in the grounds or in the submissions made to me that that threshold has been crossed. I do not find that the Judge's assessment of the evidence before him was perverse. On the contrary I consider that the Judge gave cogent reasons for his findings.

25. It is correct that in a number of places in the determination the Judge used strong language to describe the Appellant's immigration history. He referred to the Appellant using a strategy in her appeal, that the evidence that the Appellant's husband had not worked was fanciful, that the family were determined to reside in this country even if that involved illegality, and that the family were engaged in a deliberate abuse of the process in the way they were making immigration applications.

26. It is not necessarily a material error of law for a Judge to employ strong language in criticising the behaviour of a party to the case. It is relevant if the use of language can be said to be so extreme that it betrays a bias or otherwise indicates that the party had less than a fair hearing. I do not consider that the strong language employed by the Judge, who was clearly

unimpressed by the Appellant and her husband's immigration history, could be said to be indicative of bias or otherwise an unfair hearing.

27. Part of the difficulty for the Appellant in this case is the failure on her part or her representatives' part to understand that living in the United Kingdom for almost 5 years without any form of leave is not indicative of a good immigration history but rather is indicative of a bad immigration history. The Appellant might argue that there are many others who come before the First-tier Tribunal who have worse immigration histories then she has. That may be so but that does not excuse the Appellant's behaviour nor does it transform her poor immigration record into a good one.

28. It is not an answer for the Appellant to say that she has not lived "under the radar" but has made a series of applications to the Respondent over the years. The fact of the matter is that since August 2014 those applications were unsuccessful strongly suggesting that they were without merit. Repeated meritless applications tie down the resources of the Home Office which are already stretched and they cannot be said to be indicative of a good immigration history.

29. The Appellant's defence of the separate applications that she and her husband have made run into the difficulty that nevertheless there were times when, without reasonable cause, they did not make joint applications but made separate applications. The Judge came to the view that that was tactical and not for example a mere coincidence and that there was no plausible explanation other than that this was some form of strategy being employed. That may be considered to be a strong condemnation of the Appellant's case but it was nevertheless one that was open to the Judge on the evidence before him.

30. The Judge noted that whilst the Appellant could speak English, her English was "imperfect" which belied the notion that this was a language used by her on a day-to-day basis within her family unit. The Judge drew the conclusion from that that the children would therefore be able to speak Bengali to an appropriate standard (which they would require in Bangladesh) because that was the language used in the home. That was an issue which went to the reasonableness of requiring the children to leave the United Kingdom but it also touched on the issue of the Appellant's claimed innocent explanation for the allegation of the use of a proxy test taker. The poorer the Appellant's English in 2018, five years after allegedly taking a test, the less likely it would be that the Appellant had proficient English in 2013.

31. The Appellant complains that the Judge incorrectly referred to a lack of evidence confirming the existence of friends and family who were providing support to the Appellant and her family. The Judge stated at [27] that he had been presented with an Appellant's bundle running to 397 pages but he was not referred to any of them other than a report from Ms Harris "except for pages 34, 364 and 386 to 387". In short, the Judge was

not referred to the evidence of the charitable friends during the course of the hearing but was left instead to plough through an unwieldy bundle in his own time. In those circumstances it is hardly surprising that the Judge was sceptical about the Appellant's claim to be supported by friends.

32. It also appears that Ms Harris did not comment to any significant degree on how the family had had the financial means to survive for so many years without work or State benefits. This was arguably an issue that went to the children's welfare but the Judge was not assisted by the report. Despite this the Judge did consider the bundle particularly as it related to the educational circumstances of the children. Notwithstanding the difficulties that were placed in the Judge's way as a result of poor preparation by the Appellant's representatives, he did what was expected of him and gave anxious scrutiny to this appeal.

33. The Judge had two issues to decide. The first was whether the Appellant had employed a proxy test taker. The Judge did not consider that the Appellant had been able to offer an innocent explanation for that. His reasoning in that respect was cogent and there was no material error of law in his finding of dishonesty. The second issue was whether in the real world the natural expectation would be whether the 2 children would follow the Appellant and her husband (the stepfather of SH) and relocate to Bangladesh.

34. There were no specific submissions made to me either under the immigration rules or Article 8. As I have indicated Judge Hollingworth did not deal with this 2nd issue in any detail save that if the Judge was wrong in his finding of dishonesty in the taking of an English language test that would have an impact on the proportionality exercise. I assume this was from the point of view of an assessment of the credibility of the Appellant's evidence about any obstacles that might exist to relocation and/or on the question of reasonableness more generally.

35. As I do not consider that the Judge did materially err on the issue of the English language test, it is not strictly necessary for me to deal with that aspect in any detail but for the sake of completeness I would add that the Judge gave sound reasons why the family could be expected to relocate and why it would be reasonable for the two children to leave the United Kingdom. At [32] he correctly directed himself that the behaviour of the parents could not be visited on the children. Referring to the duty imposed by section 55 of the Borders, Citizenship and Immigration Act 2009 he noted that the children's best interests were to remain within the nuclear family, not necessarily in the United Kingdom, see [35].

36. None of the three children were qualifying children at the date of the hearing. It may be that the Appellant makes a further application to the Respondent on the basis that SH is now a qualifying child and/or L will become so after 1 August 2019. That will be a matter for the Respondent to decide but the Respondent may wish to consider Judge Jones'

determination in informing his, the Respondent's, decision on any further application that might be made.

37. Judge Jones's findings in so far as they are relevant were that the children could speak Bengali to a much higher level than was being suggested by the Appellant and her husband, that the husband had worked in the United Kingdom and could find work upon return to Bangladesh. The Judge was sceptical about the evidence that the family had existed on charity for several years particularly given that the Appellant herself had said she had not worked, even though at times she had had a status that would have permitted some work. The proposition that charitable friends had supported the family over an extremely lengthy period of time from 2008, in the Judge's words, stretched "credence beyond breaking point". It is difficult to see how even with charitable support such a situation could have been sustainable for so many years.

38. If the Appellant does seek to make any further applications to the Respondent, she will need to produce rather more persuasive evidence than was presented to the Judge at 1st instance. I do not consider that there was any material error of law in the Judge's determination and I dismiss the Appellant's onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 25 March 2019

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 25 March 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge