



IAC-FH-CK-V2

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

Appeal Number: HU/08430/2019
HU/08432/2019
HU/08433/2019

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business
On 27 April 2021

Decision & Reasons Promulgated
On 27 May 2021

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

**KHALILUR RAHMAN
JANNATUL FERDOUS TRISHA MONI
[K T]
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms D Revill, instructed by Makka Solicitors Ltd
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of Bangladesh. They appealed to the First-tier Tribunal against decisions of the respondent made on 15 April 2019 refusing in the case of the first appellant his entry clearance application to join his wife, the sponsor, in the

United Kingdom and in the case of the second and third appellants, the children of the first appellant, applications for entry clearance to join the sponsor, their mother.

2. The refusal was on the basis that the Entry Clearance Officer was not satisfied that the financial requirements of Appendix FM were made out, nor that there were exceptional circumstances such as to show that the decision to refuse entry would result in unjustifiably harsh consequences in breach of Article 8 of the European Convention on Human Rights. It was common ground that the appellants were not able to meet the financial requirements of the Rules out of their own resources and that it would be necessary and, it was argued, possible to do so on the basis of third party support.
3. The judge misread the provisions of GEN.3.1(1)(b), in that she read the test as providing that there are exceptional circumstances which *could* render refusal of entry clearance or leave to remain a breach of Article 8 as reading *would* render refusal of entry clearance or leave to remain a breach of Article 8. At the error of law hearing I was satisfied that that error of the judge was material. She had considered unjustifiably harsh consequences but did this on the basis that the evidence and the circumstances *would* result in unjustifiably harsh consequences for the party rather than that they *could* do so. As a consequence, I directed that the decision could be remade in the Upper Tribunal.
4. On behalf of the appellants Ms Revill applied under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Procedure Rules 2008 to adduce fresh evidence, in the form of witness statements and employment and earnings evidence. I granted permission for this evidence to be adduced.
5. Ms Shahida Begum, who is the niece of the first appellant, had provided a witness statement, relying also on her earlier statement, confirming her salary as a staff nurse in the NHS, the fact that she lives rent-free and household expenses free with her parents, and confirming that she is in a position to provide financial support to the sponsor, her aunt, and the appellants as long as they require.
6. Ms Begum adopted her statement and Mr Clarke had no questions for her.
7. There was also a further witness statement from the sponsor, Mrs Lovely Begum Chowdhury. In that she referred to the fact that she continued to work for her previous employer though her salary had increased, and that she had also started a second job role as a crew member at Domino's Pizza on a part-time basis. She said that her combined income from both roles was over the financial threshold to support her husband and two children but made the point that her niece continued to be willing to provide third party support to the family. On cross-examination the witness confirmed that she had had the new job with Domino's since April 2020. Her gross salary from that as set out in her statement was £10,863.78. She was referred to the payslip in the bundle from 26 March 2021 stating that her total pay for the year to

date was £7,728.79. She was asked to explain the discrepancy and said that when she began the job it was not the full year, so the full year was not completed. She had begun in April though she was not sure on what date. It was put to her that the payslip indicated a shortfall in the region of £3,000 between the earnings on the payslip and the earnings she had stated. She was asked whether she was saying the difference was one month potentially and she said that due to COVID-19 it was less work.

8. She was also referred to the employer's letter, Mr Clarke making the point that it did not confirm either earnings figure and in fact provided no figures. She agreed that it was correct that she said with regard to the pandemic that she did not have fixed hours a week. She agreed that potentially if the work was not there she was paid nothing.
9. She agreed also that she was continuing in her other job. She had stated in the witness statement that she was now earning a gross annual salary of £14,510.40. This was £2,000 more than previously. It was put to her that she had not provided another employer letter to confirm that they were paying her this and she said sorry, she had not been asked about that or advised about it.
10. She agreed that as was said in the papers her husband and children were dependent on the money she earned in the United Kingdom. She was asked how much of her money she sent to the family a month and said she did not pay monthly but after five or six months.
11. She was referred to the bank statements she had put in and was asked whether she could identify anything there to show that she sent money to the family and she said she sent it by cash. There had been evidence before the First-tier Tribunal of payments to the family in Bangladesh. Money transfer slips had been provided.
12. She was referred to the earlier decision of the First-tier Judge who dismissed her appeal. She was referred to the fact that the judge had criticised her thoroughly for a lack of evidence for the circumstances in Bangladesh and she was asked whether there was any reason why she had not tried to produce that evidence and she said she had provided it. It was put to her that they had been criticised for providing no evidence about the accommodation or living circumstances of the family and this was still not before the Tribunal. The witness said that she had provided all of this information. It was put to her that they were also criticised about the lack of evidence of it being unsafe for women to work in Bangladesh and the lack of employment opportunities. She said that she could confirm that in Bangladesh husbands did not allow wives to do any work. She did not have any evidence that her husband did not allow her to work. She was asked whether it was her husband who did not allow her to work in Bangladesh and she said that in Bangladesh housewives did not work. She agreed that it was the case that her husband allowed her to work in the United Kingdom. She was asked whether she would agree that

there was work available for women in Bangladesh and she said she could confirm that in Bangladesh there were work opportunities for females but her husband did not allow her to work as she was a housewife but he allowed her to work in the United Kingdom. She was asked whether it was the case that he would let her do so in Bangladesh and she said she could confirm that in Bangladesh they did not have that environment in their family as she was a housewife but here she had opportunities to work and she did work.

13. She was asked whether her husband worked in Bangladesh and said yes, a little, he did a little work and sometimes she helped him. She was asked what he did and she said there was no specific work but whatever came in front of him. There was no reason why there was no evidence of the income he earned.
14. With regard to the accommodation in Bangladesh, it was a family house. Her husband lived with his family. There was no reason why she could not stay there with them if she went back. It was correct that that was where she had lived for the seventeen years before coming to the United Kingdom. The house was in a rural village area.
15. Her son was now 4½ and had not yet started school. Her daughter was 19 and was studying at school. She was asked what she was studying and said no specific direction but she was studying and would take any specific direction within the United Kingdom. She was asked whether her daughter was studying any particular subject or qualification and said she was trying to achieve something good and she intended to have a good education. She was not at university but at the college. She did not know what she was studying. She was still living in the family house with the witness's husband. There was no reason why there was no witness statement from her daughter concerning her circumstances now she was an adult. She was asked whether this was because she was not dependent on her and her husband as her husband alleged and she said that her daughter was studying and not doing anything else and was staying with the family.
16. On re-examination the witness was asked what she did with her wages and she said that for the Domino's job she was paid by transfer to her bank account and the other job was mostly cash in hand. Some of that she put in the bank and some she kept for her own expenses.
17. In his submissions Mr Clarke argued that there were problems with the documentary evidence before the Tribunal. The application had been refused as the income level was below the threshold. No error of law had been contended for in the judge's findings of fact, so that was the starting position at least. The judge had made specific findings about the lack of evidence. The sponsor had come to the United Kingdom in 2018.

18. There was now new evidence which was said to be enough to show the income threshold was met today. It could not be met at the date of decision as had been accepted and funds from the third party in the alternative were argued for on the basis that there would be unjustifiably harsh consequences. The couple had two children at the time of the decision and the threshold is £24,800. There would only be one child as of today's date, so the figure would be £22,400, being the first appellant and the younger child. It was necessary to show family life of the daughter so as to make out any argument about disproportionality to refuse her entry clearance. If the third party support were allowed, then it could be disproportionate on the basis of unjustifiably harsh circumstances. There was no new evidence from the family in Bangladesh. The new bundle had nothing with regard to any of the issues the judge had addressed, so they had not shown the necessary circumstances even with the lower threshold. It seemed there was property in Bangladesh and employment. It was argued that it was incredible that the sponsor would be precluded from working if her husband would not let her but he let her work in the United Kingdom. There was no evidence as to the property being too small or inadequate. So, given the job opportunities, property and the appellant working and the vague answers about that, the Tribunal could not be satisfied on the basis of harsh consequences.
19. With regard to the income as of today, the evidence was problematic. Even if the relevant figure was £22,400 the employers' letters were inadequate even at today's date. They did not meet the requirements of Appendix FM in that it was necessary to confirm employment and gross annual salary. The latter had not been done nor the period over which the salary had been paid. It transpired that the Domino's job was only there when work was available and it was important with regard to the payslip evidence. The sponsor had given her explanation for the discrepancy in the figures, referring to the date when the work began, but that could only be two or three weeks short of a year, and that was not enough to make up the shortfall. It would still leave her short by some £760 of the required level.
20. Also, it was said that the earnings from the other employer had gone up but there was no new employer's letter, so it was difficult to see even without the daughter in the equation that the earnings level was met. They could therefore not succeed and third party support could not be relied on. In any event, the daughter was now an adult aged 19 and there was no witness statement from her and there was no presumption of family life between adults. It could not be assumed even that she was still living in the family accommodation. The requirements of the Rules were not met and there were no circumstances to show disproportionality.
21. In her submissions Ms Revill relied on and developed the points made in her skeleton argument. The respondent argued that under the Rules there could only be consideration of third party support if it was thought that there were exceptional circumstances to make the situation harsh but that did not bind the Tribunal. Reference was made to the guidance in Hesham Ali [2016] UKSC 60 on this. The Immigration Rules expressed the Secretary of State's policies and weight was to be

attached to them, but they were not the law. The Tribunal was bound not to follow what was said in the Rules if they did not allow for consideration of all relevant issues. The guidance in MM (Lebanon) [2017] UKSC 10 was relied on in this regard with what it had to say about third party support. This issue was relevant for Article 8. The Tribunal could not treat the tests in the Rules as determinative. It was part of the overall proportionality assessment. No special weight was to be attached to the Secretary of State's view. It was said at paragraph 99 in Hesham Ali that the Tribunal must take account of alternative sources of finance. At paragraph 101 it was said that the Immigration Rules were not unlawful but might need to be amended to take account of the need to make provision for third party support and that had been done and was now in the Immigration Rules. However, the MM (Lebanon) point still stood.

22. The First-tier Judge had erred in considering exceptional circumstances without third party support and found there were no such circumstances, so had not considered it. That was wrong. The third party support was important here.
23. Family life was to be considered as at the date of the hearing. The issue raised by Mr Clarke as to the potential independence of the daughter now being over 18 had not been raised previously and she had been over 18 at the time of the hearing before the First-tier Tribunal and as the matter had not been argued before the appellant could not be criticised for not providing evidence in that regard now. The application had been made when she was under 18 and so she was to be treated as being under 18. There was family life as of now and no reason to disbelieve what the sponsor said. It would be unusual culturally in Bangladesh for the daughter to be living separately.
24. The Tribunal was not asked to go behind the judge's findings of fact as it was agreed that there was nothing to show that the family could not live together in Bangladesh as they had done previously. There was the question of needing to follow the Rules. That had been accepted in all respects except the minimum income point and the policy behind that was required to be taken into account. Put generally, they were entitled to come and live in the United Kingdom but the level of support required was as set out and that was entirely reasonable. That was entirely met in this case at the date of application and as of now. The third party evidence had not been challenged plus the sponsor's earnings. It was reliable evidence and the third party evidence had not been disputed. The Tribunal had evidence of her income and she was in a stable job and had been doing it for a time and could afford to provide the support.
25. Regardless of whether the Tribunal accepted the sponsor's second job, the legitimate public interest was entirely satisfied and there was limited interest in refusing entry clearance therefore and what was said in MM (Lebanon) was relevant to this. The minimum income had been made up.

26. As regards the evidence respecting the second job, the employer's letter did not meet the requirements of the Rules but it confirmed the employment, which did not seem to be disputed, and it was a matter for the Tribunal's judgment on this. As regards the payslips, her pay was dependent on the hours done and hence the variations and Ms Revill thought the witness statement figure was a consequence of adding the gross pay over six months and doubling it, it was clearly a rough estimate. That was credible in the context of the pandemic and relevant to the reduced hours. She was doing more normal hours now. The employment was relatively durable and it should be accepted that there was a genuine income and a job.
27. As regards the other job, it was true there was no update letter but reference was made to the bundle with the earlier letter and it did not seem the job had not been accepted. It was again a matter for the Tribunal's judgment.
28. Taking all into account, there was evidence of ongoing support at the requisite level and no need to show they were living in dire circumstances or that the sponsor could not live with them in Bangladesh. It was a question of whether they needed to meet the requirements of the Rules when the evidence showed the levels were met. The other factors were as set out in the skeleton argument, in particular at paragraph 15. Exceptional circumstances was not a threshold, just an exception to the general rule. The best interests of the child were relevant as was the sponsor's British citizenship. There was a relatively low public interest in refusal. The appeal should be allowed.
29. I reserved my decision.

Discussion

30. Appendix FM GEN.3.1 states as follows:

“(1) Where:

- (a) the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. applies, and is not met from the specified sources referred to in the relevant paragraph; and
- (b) it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child; then

the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support

or funds set out in paragraph 21A(2) of Appendix FM-SE (subject to the considerations in subparagraphs (3) to (8) of that paragraph).”

31. It is common ground that the earnings of the sponsor in this case were not such that at the date of application or the date of the hearing before the judge the minimum income requirements were met. The financial requirements were such as to require a gross annual income of £24,800, and her earnings at that time were £12,214.80.
32. The first point to be addressed is whether the situation as of now is such, albeit bearing in mind that at the date of application the requirement to meet the requirements of the Rules must be met, albeit that Article 8 has to be decided at the date of the hearing, that the sponsor’s earnings are such as to meet the specified level. In relation to this it may be appropriate to take account of the fact that since her daughter is now 19 the necessary earnings would be £22,400.
33. As noted above, the earnings at the time of the hearing before the judge were £12,214.80 per annum. In her witness statement the sponsor says that she is now earning £14,510.40 from that job. She refers to payslips and bank statements, but has not provided a letter from her employer. In an absence of such documentary evidence I am not prepared to accept that her earnings have increased as claimed. This is particularly so bearing in mind the difficulties that I find there to be with her evidence in respect of the second job. She claimed to be earning £10,863.78, but was unable to explain satisfactorily why it was that the total pay stated on the payslip of 26 March 2021 which only two or three weeks short at the most of the full year, showed a total pay of £7,728.79. If she did, as Ms Revill suggested, take six months of payslips and double them, then that was not an appropriate way in which to calculate her earnings in light of the figure on the payslip of 26 March 2021. Nor was she assisted in this regard by the letter from the employer which said nothing about the salary that she is earning. In the circumstances, I do not accept that her earnings from Spice of Romsey are more than the £12,214.80 that she was earning at the time of the hearing before the judge, and I do not accept that her earnings from Domino’s were more than the £7,728.79 in the payslip for 26 March 2021. As a consequence, her earnings come to something slightly under £20,000 a year and again are short of the minimum required even if one discounts her daughter from the equation.
34. Accordingly, in order for the appellants to succeed under the Immigration Rules, it is necessary for them, in accordance with the Rules set out above, to show that it is evident from the information provided that there are exceptional circumstances which could render refusal of entry clearance a breach of Article 8 because it could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child in order for third party income to be considered.
35. Ms Revill has argued that the Tribunal, in light of what was said in particular in MM (Lebanon) and Hesham Ali, can effectively come to its own view in the assessment of proportionality. She accepts that the Tribunal must have regard to the extent to

which the appellants satisfy the requirements of the Immigration Rules and argues that third party support has to be considered notwithstanding that the Rules only mandate doing so where it is evident that there are exceptional circumstances which could render refusal a breach of Article 8.

36. The Immigration Rules were amended as a consequence of MM (Lebanon) to take into account circumstances in which third party funding might be appropriate. We are reminded in Hesham Ali that the policies adopted by the Secretary of State and given effect by the Rules, though they are not law and do not govern the determination of appeals, are nevertheless a relevant and important consideration for Tribunals determining appeals brought on Convention grounds because they reflect the assessment of the general public interest made by the responsible Minister and endorsed by Parliament.
37. As Mr Clarke has argued, it appears that there is accommodation for the family in Bangladesh, the first appellant works, and there is no suggestion that the quality of life is such as to come at all close to anything resembling unjustifiably harsh consequences. It is relevant that on a proper interpretation of the Rules, it does not seem to me that one reaches the stage where it is necessary to consider whether third party support can take the amount of funding available over the minimum income level in the absence of it being shown that refusal of entry clearance could amount to a breach of Article 8 because it could result in unjustifiably harsh consequences for the applicant or the children. It would simply mean that they remained separate from the sponsor, who is perfectly free to return to Bangladesh and resume the life that she lived there with her husband and family for some seventeen years before coming to the United Kingdom.
38. It is clearly the case in my view that the funding offered by the third party would take the amount of funds available over the minimum income threshold. But even considering the matter outside the Rules, I do not consider that the proportionality balance falls in favour of the appellants. I bear in mind the points made in Ms Revill's skeleton and in her oral submissions about such matters as the best interests of the third appellant, the improved financial circumstances of the family, the sponsor's British citizenship, the financial independence the appellants would enjoy, the fact that the first appellant speaks English and the fact that the relationship between the first appellant and the sponsor was not established when either had precarious immigration status in the United Kingdom. The best interests of the child are to remain with his parents and sister (and in this regard I should observe that I see no force to the point that the elder child may be living away from home. As Ms Revill argued, it would be very unusual for her at the age of 19 to have moved away from the family home). The fact remains that the requirements of the Immigration Rules are not met in this case, and though there are circumstances that favour the appellants, equally there are circumstances relating to the public interest which go the other way. The appellants have a home in Bangladesh where they lived with the sponsor for a number of years, and I attach weight to the guidance set out in the

Rules as to the circumstances in which third party support may be made. That is not a complete answer, as is clear from Hesham Ali, but bearing in mind the public interest in this case in maintaining a fair and clear immigration system and balancing that against those factors that favour the appellants, I consider that the proportionality balance falls against the appellants. As a consequence, these appeals are dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

A handwritten signature in black ink, appearing to be 'Allen', written in a cursive style.

Signed

Date 26 May 2021

Upper Tribunal Judge Allen