Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/16904/2012
OA/16905/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 16 July 2013	**On 7 August 2013**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

MAHMUDA AKHTAR REHA
SHAYEK AHMED

Appellants

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:

For the Appellants: Mr B Caswell, instructed by Cartwright King Solicitors
For the Respondent: Mr N Diwnycz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants (a brother and sister) were born on 25 May 1994 and 1 June 1996 respectively and are citizens of Bangladesh. On 9 August 2012, the ECO decided to

refuse their applications for entry clearance to the United Kingdom for settlement. The appellants appealed to the First-tier Tribunal (Judge Sarsfield) which, in a determination promulgated on 30 April 2013, dismissed the appeals. The appellants now appeal, with permission, to the Upper Tribunal.

2. The applications fell to be considered under paragraph 297 of HC 395 (as amended):

> "297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
>
> (a) both parents are present and settled in the United Kingdom; or
>
> (b) both parents are being admitted on the same occasion for settlement; or
>
> (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
>
> (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
>
> (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
>
> (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and
>
> (v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and
>
> (vi) holds a valid United Kingdom entry clearance for entry in this capacity; and

(vii) does not fall for refusal under the general grounds for refusal."

3. The First-tier Tribunal heard evidence from the appellants' sponsor and mother, Malekan Bibi (hereafter referred to as the sponsor). At [15] Judge Sarsfield wrote:

> "Following the above [findings of fact], I find the appellants have always lived with their father and continue to do so. There has been contradictory evidence and attempts to enhance their case. Overall, I am not satisfied that their mother is credible. I consider that the brother, Shamin, their father and the witness are unreliable and not credible too. I consider they have done their best to try and procure entry to the UK for the appellants at all costs. I do not find that their father has abandoned them or abdicated responsibility at all. I do not find that the mother has had sole responsibility for their upbringing or welfare, nor continues to do so. There are no serious and compelling reasons for the appellant to come to the UK, with their father and siblings in Bangladesh. I found that all the requirements of paragraph 297 have not been met."

4. As regards the refusal under the Immigration Rules, the grounds assert that the judge had "relied heavily" on the fact that the appellant had lived in the same house as their father when it was not in dispute that their father has another to support with whom he shortly intends to emigrate. It was alleged that the judge had wrongly failed to take into account the extent of contact between the mother and her children by way of daily telephone calls. It is asserted that the judge failed to deal entirely with the requirements as to the maintenance of the appellants in the United Kingdom.

5. Judge Sarsfield noted that DNA evidence had been obtained to confirm that the appellants are the children of the sponsor. He found that there was "no issue over accommodation" in the United Kingdom. He was not, however, satisfied that there had been any financial support from the sponsor to the children since March 2012. He also rejected the sponsor's claim that the children's father in Bangladesh "had no part in their lives". He did not accept that that could be the case given that the children lived with the father. He found that the school letter did not indicate that the school had any contact with the sponsor in the United Kingdom "in relation to the appellants' education at all". Most seriously, from the point of view of the sponsor's credibility, the judge found that the second appellant claimed that he was unemployed, whilst the sponsor claimed he was working on a farm. Mr Caswell argued that the judge had attached "undue weight" to that inconsistency.

6. Judge Sarsfield was best placed to assess the credibility of the witnesses who appeared before him, in particular, the United Kingdom sponsor. He observed that some of the important facts in the case only emerged at the hearing and had not been dealt with in written statements. Mr Caswell did not submit that the judge had misunderstood the evidence or that his findings that the second appellant and the sponsor had given inconsistent evidence about the second appellant's employment was in any way inaccurate. In those circumstances, I consider that it had been open to Judge Sarsfield to conclude, on the basis of all the evidence before him, that the sponsor was not a credible witness and to find that the appellants have not discharged the burden of proving that their sponsor/mother had sole responsibility

for their upbringing and welfare. The criticism of attaching "undue weight" to plainly discrepant evidence is not, in my opinion, made out. The United Kingdom sponsor claimed to have sole responsibility for upbringing of the second appellant; the fact that she appears not even to have known whether or he was employed in Bangladesh was, by any standards, a telling comment on their relationship. That finding was sufficient to dispose of the paragraph 297 appeal because the appellants were required to satisfy each of the sub-paragraphs of the Rules.

7. The grounds also challenge the judge's findings regarding Article 8 ECHR. It is asserted that the judge failed to have regard to the best interests of the children as required by Section 55 of the Borders, Citizenship and Immigration Act 2009. That ground, however, ignores the fact that the children are outside the United Kingdom and Section 55 does not apply to such children (see **T (s55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483 (IAC)**). Having regard to **T**, there was nothing in these appeals which indicated that exclusion of the appellants from the United Kingdom would jeopardise their welfare. It appears that the children were satisfactorily accommodated and cared for by their father in Bangladesh; there appeared to be no threat to their welfare posed by the father's wish to emigrate.

8. The judge's determination of the Article 8 ECHR appeal is also challenged on the basis that he wrongly found that there was no family life between the United Kingdom sponsor and the appellant. That challenge ignores the judge's finding that the United Kingdom sponsor was an unreliable witness. Though he does not expressly say so, it is clear from the determination that the judge placed no reliance upon anything which the United Kingdom sponsor said regarding her relationship with the appellants (including her claim to have daily telephone contact with them). On the facts of these particular appeals, I find that it was open to the judge to conclude that there was no family life. However, even if the judge was wrong in making that finding, any error is redeemed by the fact that he has proceeded at [20] to consider proportionality. The judge concluded that "any refusal would be proportionate to the legitimate aim of the maintenance of immigration controls and in accordance with the law". Given that the judge had found that the children were living with their father who cared for them and (in the absence of any recent evidence such as money transfers from the United Kingdom) maintained them, it is difficult to see why the judge should not have reached that conclusion. It was an outcome clearly available to him on the evidence.

9. I find that the judge has not erred in law such that his determination should be set aside. These appeals are set aside.

DECISION

These appeals are dismissed

Signed Date 30 July 2013

Upper Tribunal Judge Clive Lane