Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/18384/2012
OA/18387/2012
OA/18389/2012
OA/18391/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 September 2013	**On 16 December 2013**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

DHON MIAH
HEENA BEGUM
RIMA BEGUM
MOHAMMED JUNED
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:

For the appellants: Mr Choudhury
For the respondent: Ms Vinyaharan

DETERMINATION AND REASONS

1. The appellants are citizens of Bangladesh and comprise father (the principal appellant 'the appellant') born in 1965 and his dependent children (two daughters and a son) born in 1994, 1998 and 1996 respectively. They applied for entry clearance to the UK to settle with the sponsor, Mrs Saida Nessa, a British citizen born in 1972 who is the spouse of the appellant and the mother of the three children. Mrs Nessa has three more children (Bangladesh born twins aged 12, and a UK born child aged 9. One of the twins is disabled) in the UK. There are a further two older children in Bangladesh. They have independent lives and are not involved in the appeal. It is not disputed that the appellant and sponsor are the parents of all the children.

2. The Entry Clearance Officer refused the application on 26 August 2012 in respect of the appellant under paragraph 281 of the Immigration Rules. The children were refused under paragraph 297.

3. In summary, for the appellant the ECO was not satisfied that the marriage was a genuine and subsisting relationship. Also that the maintenance requirement was not met.

4. The refusal letters in respect of the children are in near identical terms. In line with their father the ECO was not satisfied on maintenance. Nor was he satisfied that the sponsor had sole responsibility for the children's upbringing.

5. In respect of all the appellants the ECO considered that any interference with right to respect for family life was proportionate to the legitimate aim.

6. They appealed.

7. Following a hearing at Taylor House on 14 May 2013 Judge of the First-tier Tribunal Jhirad dismissed the appeals.

8. Her findings are at paragraphs 7.1 to 8 of her determination. In summary, she concluded that the marriage was not subsisting as there was little evidence of contact. Also the appellant had never sought entry clearance to visit the sponsor. As for maintenance the sponsor does not work. Weekly benefits for her and her children were more than £250 less than the income she needed to show. The offer of third party support from a restaurant owner was not genuine. Thus the maintenance requirement was not satisfied.

9. The appellants sought permission to appeal which was granted by a judge on 24 June 2013 who stated:

> '2. *The application for permission to appeal is based upon the failure of the First-tier Tribunal Judge to take into account any matters relating to the welfare of the children affected by this appeal.*

3. *The first Appellant and his wife (who is a British citizen living in the United Kingdom) have eight children. The younger three live in the United Kingdom with their mother (the Sponsor). Three of the older children are the second, third and fourth Appellants whilst the two oldest of the eight children are now married and living independently in Bangladesh.*

4. *Having read the determination of the First-tier Tribunal Judge I am satisfied that she has made no mention of any issues which affect the welfare of the children and I am satisfied that this is an arguable error of law particularly on the basis that the children of the family are split between two continents and one of the children who lives with the mother is disabled.*

5. *The grounds of the application point to various legal provisions making it a requirement for the welfare of children to be considered in such circumstances for example Article 8 of the European Convention on Human Rights, the UN Convention on the rights of the child and guidance is provided in case law and the IDIs as to how the issue of the welfare of children affected by an immigration decision is to be dealt with.*

6. *In the circumstances I am satisfied that there is an arguable material error of law in the determination of the First-tier Tribunal Judge and accordingly the application for leave to appeal is allowed."*

10. At the error of law hearing before myself on 30 July 2013 Mr Choudhury essentially adopted the grounds. He submitted that the judge erred in failing to consider Article 8 ECHR. As for the findings under the Rules the judge had been wrong to state that the appellant had not applied previously for entry clearance. Although he had not applied as a visitor he had applied before for settlement. As for maintenance while it was accepted that the sponsor's income was inadequate, there had been a lack of proper consideration to the offer of third party support which included a job offer for the appellant.

11. In reply Mr Wilding for the respondent agreed that the judge had erred in failing to consider Article 8. However her decision under the Rules was adequate. Whilst it was correct that the appellant had made previous settlement applications the judge was correct to state that no visit applications had been made. That matter was essentially peripheral. Of greater import was the finding that there had been almost no communication between the sponsor and appellants. The finding that there was no subsisting relationship was sustainable. As for maintenance the judge had given adequate reasons for rejecting the evidence that the appellant, an unskilled man, had a job offer and that the claim of third party support was credible.

12. I considered that the judge's findings under the Immigration Rules were sustainable. She was entitled to find, it being accepted that the parties had not seen each other since 2003, that there was little evidence of contact since she came to the UK in that year.

13. The judge was correct to hold that the appellant had never applied for entry clearance to visit the sponsor. She did note (7.1) that applications had been made for settlement.

14. As for maintenance it was agreed by both parties that the sponsor was not able to show that she had adequate income to support the appellants without recourse to additional public funds. The judge was entitled to find that it had not been shown on the evidence that the restaurant owner could afford to employ the appellant or that there is a vacancy. In that regard an incumbent, who it was said was temporarily employed in place of the appellant, had not been shown not to have employment rights. Further, the evidence as to wages the appellant would receive was vague. I concluded that the judge was entitled to find that the evidence of a job and of third party support lacked credibility.

15. Mr Wilding accepted that the judge had failed to give consideration to Article 8 and that such amounted to a material error of law.

16. I concluded that the judge's decision in respect of the Immigration Rules showed no material error of law and the decision dismissing the appeals in that regard, stood. It was agreed that the judge having failed to deal with Article 8 that aspect of the case had to be dealt with.

17. However, we were not able to proceed immediately to deal with that aspect of the case as no interpreter had been asked for and it was not possible to get one on the day.

18. The case was adjourned until 17 September 2013 before myself for evidence to be led on Article 8.

19. At the resumed hearing it was agreed that the only issue was Article 8. I heard evidence from Mrs Saida Nessa. She adopted her two statements. She said she has problems with her daughter, Tanjana, who is now 12 years old. She has had problems since birth. She has one leg shorter than the other. She lacks strength in the shorter leg. Following an operation some months ago she is bedbound 24 hours a day and needs full support which includes being taken to the toilet, washed and turned in bed. The witness did not know if this was temporary and whether the operation would improve her daughter's condition.

20. She said the responsibility of caring for Tanjana as well as for her other children and other household duties falls on herself. She has no help in the house. Her sister, who lives in Brighton, comes up to look after the other two children when Tanjana is in hospital. She also sometimes gets help from social workers. A benefit of having her other children come from Bangladesh would be that they would be able to help. In addition the family would be together.

21. She was asked about her family. She has in the UK twins born in Bangladesh and the youngest child born a few months after arrival in the UK. There are five children in

Bangladesh. They are all the children of herself and the appellant. The two eldest have not sought to come for settlement as they are married and settled in Bangladesh. The younger children are upset when she speaks to them on the phone. It would be less distressing if the family was united.

22. She said she had last seen her (Bangladesh) children in 2003. She had not seen them since she came here.

23. Asked about schooling she said the Bangladeshi children who are of school age attend the madrassah. As for the British children, two are in secondary, one in primary. Tanjana was usually able to go to school although not for a period before the operation or since it. A teacher now comes to the house three days a week. Tanjana had been attending normal school not a special school. She had been able to walk there.

24. In cross-examination asked about her immigration history she said that having come on a visit visa she was told that she could apply to remain permanently on the basis that her father had a right of abode. He was now dead. She did not know when she got permanent residence.

25. Asked why, when she got settlement the other family members had not sought to join her she said that at the time her siblings and others had advised that they wait and gather evidence.

26. She was asked about contact between the family here and in Bangladesh. She said they communicate by DVD, CD, films and photographs. They do not write as the UK children, although they speak Bengali are not able to write it. They are in regular phone contact.

27. Asked who makes the day-to-day decisions about the three children in Bangladesh she said it was their father who looks after them. Extended family there give some help. However, the witness said, she wanted them to come to the UK as they need their mother.

28. In re-examination she said that the father was involved in discussion about the children with her. Also the children sometimes get in touch seeking advice.

29. In submissions, the emphasis from both sides was on the children. Ms Vinyaharan stated that at the time of application the children were in reality, young adults. They have been under the care of their father and their day-to-day needs have been met by him as their sole carer. There was no indication that they were anything other than well cared for. Their mother had, effectively, given up caring for them in 2003 when she came to the UK. Although it was claimed that she and the UK children are in regular contact there was little evidence of this. No good reason had been given why she had not sought, once she got settlement, to visit her family in Bangladesh particularly as her child Tanjana's disability did not appear to be too serious.

30. Ms Vinyaharan, noting that no statements had been lodged from the children in Bangladesh, submitted that the best interests of the children abroad were to remain with their father the person who had been their sole carer for years.

31. In reply Mr Choudhury submitted that it was important to remember that the child applicants were, indeed, still children at the time of application. There was evidence of communication between them in the form of phone cards. It was reasonable to accept the mother's evidence that she struggles more or less on her own to care for her family not least because of the long-term physical problems that Tanjana has. These amount to compassionate circumstances. Were the other siblings to come to the UK the family situation would be better. As for the failure of the mother to visit, leaving the children in the care of their grandmother or others would make that difficult.

32. As for the best interests of the children abroad it would be better for them in terms of education and more generally were they to come to a first world country. The whole family not just the family abroad would benefit emotionally and practically.

33. Turning to consider article 8 the House of Lords in **Huang [2007] UKHL 11** made it plain that a step-by-step approach as laid out in **Razgar [2004] UKHL 27** was the appropriate method in an Article 8 case. The first question is to assess whether the respondent's decision amounts to an unjustified lack of respect for family life, focusing on the UK's positive obligations to facilitate family reunion.

34. I also remind myself that I am not solely concerned with the rights of the appellants, but I must also consider the direct impact of the refusal on the other family members.

35. The first question is whether there is family life for the purpose of Article 8. I consider the appropriate approach is not to consider each one to one relationship in turn and in isolation. The approach is to consider whether family life exists within the group as a whole and then assess the claimant's position in it. I find that family life exists within the group as a whole. While the father's situation vis a vis the sponsor is one of effectively no relationship as there is no genuine and subsisting marriage, there is family life between him and his children in Bangladesh and in the UK, and I consider that the same applies in respect of the mother and her children in the UK and Bangladesh. In **Berrehab v The Netherlands [1989] 11 EHRR 322** the European Court said that the 'concept of family life embraces, even where there is no cohabitation, the tie between a parent and her child.' In light of the family dynamics looked at as a group, I conclude that there is family life in respect of the appellants and the sponsor.

36. The effect of the decision to refuse the appellants hinders the enjoyment of family life in these circumstances. The Court of Appeal has clarified that the question of significant interference must not be read as meaning the minimal level of severity required is a special or high one (see **AG (Eritrea) [2007] EWCA Civ 801**). There is clearly an interference of sufficient gravity to require consideration to be given to the remaining steps.

37. The decisions are clearly lawful in the sense that they were made within the legal framework of the Immigration Acts and the Immigration Rules and were in pursuit of the legitimate aim of maintaining immigration control.

38. The real issue for determination in this case is whether the refusal strikes a fair balance between the competing interests of the appellants and the community as a whole and was therefore proportionate to the legitimate aim pursued, or whether the appellants' circumstances demand that a departure be made from the Rules given that they cannot be met at present.

39. My approach to the question of proportionality is guided by the House of Lords opinion in **Huang** as follows:

> *'In an Article 8 case where this question is reached, the ultimate question for the [tribunal] is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the [tribunal] must so decide'.*

40. In considering proportionality the appellants fail to satisfy the Rules. Such is not a factor in their favour in considering the balancing exercise.

41. Moving on to the children, although section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to children who are outside the UK, where there are reasons to believe that a child's welfare may be jeopardised by exclusion from the UK, the considerations of Article 8 and the extra statutory guidance to Entry Clearance Officers to apply the spirit of the statutory guidance in certain circumstances should be taken into account by the judge on appeal (see **T (s.55 BCIA 2009 – entry clearance) Jamaica [2011] ULUT 00483** and **Mundeba (s.55 and para 297(i)(f) [2013] UKUT 00088**).

42. In this case in looking at the circumstances of the family in Bangladesh the children at the date of application were fourteen, sixteen and seventeen years of age. I find that the person responsible for their day-to-day upbringing was their father. It was he who had sole responsibility for their upbringing. Although in re-examination the sponsor sought to suggest that she was involved in day-to-day decisions about their upbringing with their father by telephone I found more truthful her clear answer in cross-examination that it was their father who made the day-to-day decisions. I take support in that view from the dearth of evidence of contact between the sponsor and her husband. As the First-tier Judge noted the only evidence of contact was five phone cards, three of which were post decision. As the judge noted one would reasonably have expected much greater evidence of contact by phone particularly as there had been previous applications for settlement.

43. As for contact between the sponsor and her family here, and her children in Bangladesh I can accept that the British children do not write Bengali so that letters or perhaps even cards were not feasible. However, I find particularly striking that apart from the tiny number of phone cards (which do not remotely support the sponsor's claim to be in daily contact), there is no documentary evidence whatsoever of contact between her and the children in Bangladesh or between her children here and the children and their father there. No evidence at all was produced to support the claim of regular contact by means of videos, CDs, photographs, items which one would reasonably have thought would have been easily produced and exchanged.

44. The evidence in this case is that the sponsor having come to the UK apparently as a visitor in 2003 chose to remain. The circumstances under which she was able to do so were unclear and no documentary evidence on this was produced. However, it was not suggested that it was anything other than lawful. It is also not suggested that the sponsor, and her children who have lived here all or most of their lives, should reasonably be expected to live with the other family members in Bangladesh. Her decision to remain was of course her choice but it suggests that a desire for settlement was greater than a desire to return to her family. I take nothing from the fact that she has not sought to return as a visitor to see her family. I can accept that with her family responsibilities and financial constraints such would be difficult. I see no reason to doubt that as a single parent, albeit with some help from her mother, friends and social workers, it can be difficult to care for her children here. It is clear that Tanjana has a physical disability. The medical letters state she has one leg longer than the other. She has had an operation to remedy that. Contrary to the sponsor's oral evidence the indication from the doctors is that the prognosis is satisfactory. Some of the evidence about recent medical events was post decision. However the clear indication from the oral evidence and a pre decision medical letter is that Tanjana is able to function fairly well on a day to day basis, being able for example to walk to school. The overall picture is that the family here is able to get by day to day well enough.

45. Looking at the evidence in the round the clear indication is that there are two family units, the British and Bangladeshi units functioning separately with little communication or contact between them. There is no evidence of intervening devotion between the parents. The evidence points clearly to the conclusion that on leaving Bangladesh permanently in 2003 the sponsor gave up her role as carer of her children there, leaving it to their father.

46. Returning to consideration of the Bangladeshi children in the care of their father, as indicated they are no longer young children, their continuity of residence and their development through their formative years since 2003 has been with their father. There is no indication or suggestion of neglect or abuse by the father or his extended family. There is no indication that there are unmet needs that should be catered for. There are stable arrangements for their physical care. Their friends, social background and community are in Bangladesh.

47. I note that there are no statements from the siblings in Bangladesh indicating their views. They are old enough to have expressed an opinion.

48. As the evidence does not show contact between the younger British based children and their significantly older Bangladeshi siblings I see little merit in the claim that the British children would benefit emotionally by the admission of their siblings (or indeed that the older children would). I take the same view, in light of the lack of evidence of contact, about emotional benefit to their mother or, indeed to the father. Should the separate units wish to get in touch they can do so.

49. Mr Choudhury in his submissions emphasised that the children in Bangladesh would have a better education and a better life in the UK than at home. The material advantages of life in the UK is not the test. The loss of their cultural roots in the society in which they have grown up and the lack of any evidence that they have basic unmet needs and are at risk of harm are relevant factors. I do not see that the combination of circumstances are sufficiently serious and compelling to require admission.

50. I conclude that the best interests of the Bangladeshi children are to remain with their sole carer their father. Such, accordingly, is not a factor in the appellants' favour in the balancing exercise.

51. Looking at all the material circumstances in balancing the respective interests of the parties, I find the decision to refuse entry clearance does not amount to an unjustified lack of respect for family life and the positive obligations to facilitate family reunion and I therefore dismiss the Appellants' appeals on Article 8 grounds.

Decision

The decision of the First tier Tribunal showed no material error of law in its consideration under the Immigration Rules and that decision dismissing the appeals stands.

The appeals are dismissed on human rights grounds (Article 8).

Signed Date

Upper Tribunal Judge Conway