



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/20745/2012

**THE IMMIGRATION ACTS**

Heard at Sheldon Court, Birmingham  
On 23<sup>rd</sup> July 2014

Determination Promulgated  
On 5<sup>th</sup> August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER - DHAKA

Appellant

and

NAZMIN BEGUM  
(ANONYMITY ORDER NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer  
For the Respondent: Mr M Singh of One Immigration

**DETERMINATION AND REASONS**

**Introduction and Background**

1. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal. I will refer to her as the Claimant.
2. The Entry Clearance Officer (ECO) appeals against a determination of Judge of the First-tier Tribunal S J Pacey (the judge) promulgated on 24<sup>th</sup> March 2014.

3. The Claimant is a female citizen of Bangladesh born 8<sup>th</sup> August 1986 who applied for entry clearance to the United Kingdom to enable her to settle as the spouse of Mohammed Kobirul Islam (the Sponsor) who is settled in the United Kingdom.
4. The application was refused on 2<sup>nd</sup> October 2012. Because the application had been made prior to the amendment of the Immigration Rules on 9<sup>th</sup> July 2012, the application was considered with reference to paragraph 281 of the Immigration Rules.
5. The ECO did not accept that it had been proved that adequate accommodation or maintenance would be available for the Appellant and the application was therefore refused with reference to paragraph 281(iv) and (v). The ECO considered that refusal of entry clearance would not breach Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
6. The Claimant appealed to the First-tier Tribunal contending that adequate accommodation and maintenance would be available. There was no appeal pursuant to Article 8.
7. The application was reviewed by the Entry Clearance Manager (ECM) in the light of the appeal. The decision to refuse entry clearance on accommodation and maintenance grounds was upheld. The ECM raised a new issue, not being satisfied that the Claimant's English language certificates were valid, as a result of inconsistencies that had been discovered in testing in Bangladesh.
8. The appeal was heard by Judge Pacey (the judge) on 3<sup>rd</sup> March 2014. The judge found that the Claimant had discharged the burden of proof in showing that adequate accommodation and maintenance would be available. The judge found that the ECO had provided no evidence to demonstrate that the Claimant's English language certificates could not be relied upon. The appeal was allowed under the Immigration Rules.
9. The ECO applied for permission to appeal to the Upper Tribunal. It was contended that the judge had erred in paragraph 4 of the determination by making reference to the Sponsor's gross earnings being sufficient to provide adequate maintenance, as it was the net earnings that were relevant.
10. It was contended that the judge had erred in paragraph 5 in stating that additional independent corroborating evidence had been provided to support the Sponsor's employment and stated income, but the judge had given no indication as to what evidence had been provided.
11. Permission to appeal was granted by Judge of the First-tier Tribunal Grant who found it arguable that the judge had erred in referring to gross income rather than net income, and in failing to set out the nature of the evidence which had been provided, and without setting out his evaluation of that evidence.

12. Following the grant of permission, the Claimant's representatives lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 indicating that they did not oppose the ground of appeal upon which permission was granted, and accepted that the judge had erred in making reference to the Sponsor's gross earnings rather than his net earnings.
13. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal's determination contained an error of law such that it should be set aside.

### **The Upper Tribunal Hearing**

#### **Error of Law**

14. Mr Singh agreed that the decision of the First-tier Tribunal contained a material error of law and should be set aside, and the decision re-made by the Upper Tribunal.
15. I did not need to hear from Mr Smart in relation to the error of law issue. I set aside the decision of the First-tier Tribunal for the reasons given in the application for permission to appeal, read together with the grant of permission. It was not clear from the determination that the judge had considered the Sponsor's net earnings, which were the relevant earnings, nor what evidence had been considered.
16. There had been no challenge to the findings made by the judge in relation to accommodation, and English language and those findings were preserved.

#### **Remaking the Decision**

17. Mr Singh indicated that he did not intend to call any further evidence. Mr Singh placed reliance upon the Sponsor's P60 tax form for the year ending 5<sup>th</sup> April 2013 which he contended showed that the Sponsor had a net weekly wage of £219.70.
18. Mr Singh deducted from that amount, the Sponsor's rent of £70 per week, and his council tax payment of £25.25 per week which gave a figure of £124.45. This exceeded what a couple would receive by way of income support, which was £111.45 per week. On that basis Mr Singh submitted that adequate maintenance was available and the appeal should be allowed.
19. Mr Smart did not dispute Mr Singh's calculations and had no oral submissions to make, save to point out that the evidence on file indicated that the Sponsor had two children from a previous marriage and there was no evidence as to whether he had to financially support them.
20. I reserved my decision.

#### **My Conclusions and Reasons**

21. I remind myself that in relation to paragraph 281 the burden of proof is on the Claimant and the standard of proof a balance of probabilities. As this is an appeal

from a refusal of entry clearance, I must consider the circumstances appertaining at the date of refusal, which was 2<sup>nd</sup> October 2012.

22. The only issue before me relates to adequacy of maintenance. This is not an appeal in which Article 8 was raised before the First-tier Tribunal. There has been no challenge to the findings of the First-tier Tribunal in relation to accommodation and English language ability.
23. As this was an application considered under paragraph 281, the principles to be considered in relation to adequacy of maintenance are those set out in KA and Others (Adequacy of maintenance) Pakistan [2006] UKAIT 00065. The requirement of adequacy is objective. The level of income and other benefits that would be available if the family were drawing income support remains the yardstick.
24. The Claimant and Sponsor must therefore prove they have an income, net of accommodation costs, equivalent to what a couple in receipt of income support would have received.
25. There is no evidence that the Sponsor has any financial responsibility for two children from his previous marriage. The fact that he has two children was disclosed to the ECO, there is evidence of this in the ECO bundle. There is a certificate issued by Oldham County Court dated 11<sup>th</sup> July 2006 which confirms the names and dates of birth of the Sponsor's two daughters. There is no indication that the county court made any order for payment of maintenance. This is not an issue that was raised either in the refusal, or the ECM review, or before the First-tier Tribunal. I therefore find the Sponsor and Claimant, must prove they have a net weekly income equivalent to what a couple in receipt of income support would have received, and that amount at the relevant time was £111.45.
26. The Sponsor's P60 for the tax year ending 5<sup>th</sup> April 2013 was contained at page 4 of the Claimant's bundle that was before the First-tier Tribunal. This shows the Sponsor's gross annual salary as £13,004, with deductions from that amount of £947.60 for tax, and £631.76 for national insurance contributions.
27. The Sponsor's net annual income was therefore £11,424.64. This gives a net weekly income of £219.70.
28. The Sponsor had to pay rent of £70 per week. The evidence of this is contained in the ECO bundle, which is not indexed or paginated, which shows the Sponsor's rent book and confirms that his rental payments were £70 per week.
29. The Sponsor's council tax must also be deducted. Mr Singh calculated this at £101 per month then divided that by four to give a figure of £25.25 per week. In my view the appropriate calculation is to take the annual charge for the twelve month period which was £1,013.11 and divide this by 52 which gives £19.48. The council tax bill for 2012/2013 is contained within the ECO bundle.

30. If the council tax payment of £19.48 is added to the rent of £70, this gives a figure of £89.48 which if deducted from £219.70 gives a figure of £130.22.
31. This is the Sponsor's weekly income after payment of council tax and rent, and as this exceeds the sum of £111.45 income support which would be paid to a couple, I conclude that it has been proved that adequate maintenance would be available.
32. As that was the only issue before me I find that the Claimant's appeal succeeds, and the appeal of the ECO is dismissed.

### **Decision**

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeal of the ECO is dismissed. The Claimant's appeal is allowed under the Immigration Rules.

### **Anonymity**

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed

Date 25<sup>th</sup> July 2014

Deputy Upper Tribunal Judge M A Hall

### **TO THE RESPONDENT FEE AWARD**

As the Claimant's appeal is allowed I have considered whether to make a fee award. Evidence has been provided to the Tribunal that was not placed before the ECO. There is therefore no fee award.

Signed

Date 25<sup>th</sup> July 2014

Deputy Upper Tribunal Judge M A Hall