IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: VA/17932/2013
VA/17936/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 November 2014	**On 24 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER – DHAKA

Appellant

and

MRS AMBIA KHATUN – FIRST CLAIMANT
MASTER ASHFAK AHMED – SECOND CLAIMANT
(ANONYMITY DIRECTION NOT MADE)

Respondents/Claimants

Representation:

For the Appellant:	Mr P Armstrong, Specialist Appeals Team
For the Respondents/Claimants:	Miss Manjit Dogra, Counsel instructed by Immigration and Work Permit Ltd

DECISION AND REASONS

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer from the decision of the First-tier Tribunal (Judge Shamash sitting at Taylor House on 14th July 2014) allowing on Article 8 grounds the claimants' appeals against the refusal of entry clearance as family visitors. The First-tier Tribunal does not make an

anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

2. Both claimants are nationals of Bangladesh. The first claimant was born on 5 October 1953, and the second claimant was born on 10 February 1997. The first claimant is the mother of the second claimant. As she is the main claimant, I shall hereafter refer to her as the claimant save where the context otherwise requires.

3. On 27 July 2013 each of them applied for entry clearance in order to undertake a two month family visit. In her application the claimant said that she was widowed, and that she had one dependent child, namely the second claimant. Her son-in-law and UK sponsor was going to pay for her travel to the United Kingdom and to meet all her expenses there such as accommodation and food. She received money from her daughter and son-in-law in the UK for family cost purposes. As evidence of her savings, she was attaching her bank statement.

4. Her daughter her was Jesmin Begum, whose date of birth is 10 October 1984. She was a British national, and her husband was self-employed. She had last seen her daughter in Bangladesh in 2010. Her daughter and son-in-law, who lived in Ely, had three children. These were her close family members in the UK. She was also hoping to see her son, Raju Ahmed, who was also a British citizen.

5. On 12 August 2013 an Entry Clearance Officer in Dhaka gave his reasons for refusing the claimant's application. He said it was reasonable for him to consider her personal and economic circumstances as part of his overall assessment of her application and her intentions in the UK. She submitted a bank account statement that showed a balance of £2,557 sterling equivalent as of 5 March 2013, and she stated that this bank statement reflected her savings. There was no documentary support demonstrating the origin of the funds that were present in this account in March 2013, so he was not satisfied these funds were available to her for exclusive use. She provided no evidence of her financial circumstances in Bangladesh, and this led him to doubt her intentions of visiting the UK at this time. She was a widow and claimed to be supported by her family in the UK. He was not satisfied that her ties were such that she intended to leave the UK on completion of her visit. He refused the application under subparagraph (i) and (ii) of paragraph 41. Ashfak Ahmed was refused in line with his mother. Both of them were informed that their right of appeal was limited to the grounds referred to in Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002.

6. In her grounds of appeal, the claimant said she is entitled to a full right of appeal as her daughter was her sponsor and she wanted to see her daughter and family. The refusal decision was unreasonable. She had enough landed property from which sufficient income was generated to maintain and accommodate herself in Bangladesh. The ECO had failed to examine the application form which clearly stated that she would be bearing the costs of travel, not her UK sponsor.

7. On 7 January 2014 an Entry Clearance Manager gave his reasons for upholding the refusal decisions. The claimants were not entitled to a full right of appeal. All rights of appeal had been removed on 25 June 2013, and so the ECO was correct in granting the claimants a limited right of appeal. The claimants had not stated in the grounds of appeal why they believed their human rights had been breached. In any event the claimants had not seen their relatives in the UK since 2010, and so he was satisfied that the modest degree of family life that had existed in recent years would continue, and would not be prejudiced or diminished by refusing them entry clearance. The claimants had strong family ties in the UK with five children/siblings living there and had shown limited evidence of their circumstances and commitments in Bangladesh. Given their reliance on family in the UK for support and their strong family ties in the UK, he was not satisfied the claimants had shown that their circumstances were such that they were genuine family visitors or that they intended to leave the UK.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. The appeals of the appellants came before Judge Shamash sitting at Taylor House on 14 July 2014. Mr Islam appeared on behalf of the claimants, and there was no appearance by a Presenting Officer on behalf of the Entry Clearance Officer. The judge received oral evidence from Mr Shahid, the claimant's son-in-law. He said it was a genuine application and one where the claimant's right to family life would be denied if she was not allowed to enter the United Kingdom, bearing in mind the close family relationship. There were a large number of family members living in the United Kingdom and it was impracticable for the sponsors all to go to Bangladesh. It was very important for the family to be reunited in the United Kingdom. He lived in a four bedroom house and he had a business running two restaurants. The balance in the claimant's bank account of £2,557 reflected income from land and selling crops.

9. Following the hearing the judge received crop receipts for both 2013 and 2014. She also received a letter from Sylhet Science College which confirmed that the second claimant continued to study there.

10. In his subsequent determination, the judge said at paragraph 20 that if he had been entitled to decide this matter under the Rules, he would have found that the claimants met the Rules. Now that there was no right of appeal against refusals, it was incumbent upon an Entry Clearance Officer to exercise care and diligence and to ensure against prejudice and/or swift decisions. Although the evidence was not before the Entry Clearance Officer, he had seen evidence of significant assets in Bangladesh. He also heard oral evidence to that effect. The judge continued in paragraph 23:

> The sponsor told me that for the family to visit Bangladesh would be impossible. For the large family settled in different parts of the world, particularly in the United Kingdom. The first [claimant] is a mother and it is important for her to be able to see her children and for her youngest son, the second [claimant], to spend time with his adult brothers and sisters. It appears that refusing this application would result in an interference of family life which would not be in accordance with the law. Such an

> interference is not justifiable because the [claimants] meet the Rules. In short, the decision is not proportionate because the [claimants] have established that they meet the Rules.

The Grant of Permission to Appeal

11. On 1 October 2014 First-tier Tribunal Judge Andrew granted the Entry Clearance Officer permission to appeal for the following reasons:

> It is arguable that the judge erred in law in his approach to Article 8 in that he did not consider in the first instance whether Article 8(1) was met, in view of the lack of dependence between the Sponsor and the [Claimants]. Further, he did not identify any arguably good grounds for considering matters outside the Rules.

The Hearing in the Upper Tribunal

12. After hearing submissions from both parties on the error of law question, I ruled in the Entry Clearance Officer's favour. My reasons for finding an error of law are set out below.

13. For the purposes of remaking the decision, I invited Miss Dogra to tender Mr Abu Shahid as a witness. In his witness statement dated 4 July 2014 he said that he had sponsored the claimants because they had not seen them for a long time and they could not visit them in Bangladesh. This was because of his business commitments and his children's education.

14. In his oral evidence, he said that he had three children who ranged in age from 9 to 2. He owned and ran two restaurants. He had a manager in one of them, but he did not employ a manager in the other restaurant. This was because it was difficult to get staff. He had not had a holiday for five years. He had not advertised for a manager. It was put to him that his wife and children could at least go out to Bangladesh for a family visit during the school holidays. He said that his wife also helped in the restaurant, and she could not travel at present, because she was not feeling well. She suffered from headaches and depression.

15. His mother-in-law had four other children in the UK. Her three other daughters here were not working. Her eldest son ran a restaurant. She did not think that the other children had gone back to see their mother in Bangladesh recently, but he did not know why.

16. In his closing submissions on behalf of the Entry Clearance Officer, Mr Armstrong submitted that the sponsor had £26,000 spread over various bank accounts, and it was simply a matter of choice for him not to go with his family to visit the claimants. There was no medical evidence to support the proposition that his wife was unfit to travel. A trip to Bangladesh would do her some good.

17. In reply, Miss Dogra submitted that it was likely that it was impractical for the claimant's other children in the UK to visit her in Bangladesh. It was illogical to apply a test of dependency when considering Article 8(1) in the context of a family

visit visa appeal, when this would be in direct conflict with the applicable Immigration Rules where dependency would negate the assumption that an applicant was a genuine visitor. What was required was an analysis of whether the applicants had a family life within the context of applying for a family visit visa. She submitted the evidence established that the claimants had a family life for the purposes of Article 8(1) of the ECHR.

Reasons for Finding an Error of Law

18. In paragraph [21] of **Muse & Ors v Entry Clearance Officer [2012] EWCA Civ 10** Lord Justice Toulson acknowledged that the case law at Strasbourg and in the UK placed a high value on the ability of families to live together: and it was well established that in this regard there is both a positive and a negative obligation under Article 8.

19. At paragraph [22] he said that the principle enunciated by Lord Bingham in paragraph 20 of **Huang [2007] UKHL 11** drew no distinction between refusal of leave to enter and refusal of leave to remain. However, that was not to say that, in the application of the principle, the question of proportionality between proper immigration control and proper respect for family life need be answered in the same way:

    (a) in a case of refusal of entry which is sought for the purpose of family reunion; and

    (b) in a case of removal which would break up a family.

    Each case has to be considered on its own facts.

20. At paragraph [23], he observed that the trauma of breaking up a family and thereby rupturing family ties may be significantly greater than the effect of not facilitating the reunion of a family whose members have become accustomed to living apart following a decision by part of the family to live elsewhere.

21. At paragraph [24] he held that where entry is sought for the purpose of family reunion, the Immigration Rules, laid before Parliament, represent an attempt by the government to strike a fair balance between respect for family life and immigration control, which includes economic considerations. It is within the state's margin of appreciation to set those Rules and as a matter of generalities the requirements are proportionate. But the Rules are the beginning and not the end of the matter. The authorities provide examples of cases which fall outside the Rules where the positive obligation of the state under Article 8 requires the giving of leave to enter. Such cases are often difficult and require close analysis of the facts.

22. As was held in **Muse v Entry Clearance Officer**, although the five point **Razgar** test was formulated in the context of removals, it should also be applied in exclusion cases. Judge Shamash erred in law in not asking himself the question whether the interference consequential upon the refusal decisions was of sufficient seriousness to

engage Article 8(1), and he did not engage with the reasons given in the ECM review for answering questions 1 and 2 of the **Razgar** test in the negative.

23. However, I find that there is no merit in the case advanced in the grounds of appeal that an Article 8 assessment in a family visit visa appeal should only be carried out where there are compelling circumstances not recognised by the Rules, following **MF Nigeria [2013] EWCA Civ 1192** and **Gulshan 2013 UKUT 00640 (IAC)**. Unlike an application for entry clearance for the purposes of settlement, there are no provisions in Appendix FM which bite upon an application for entry clearance as a family visitor. So the **Gulshan/Nagre** methodology cannot apply, and following **MM (Lebanon) [2014] EWCA Civ 985** at [134], the discretion of the judicial decision-maker assessing an Article 8 claim outside the rules is much wider. With a family visit visa appeal, the judicial decision-maker is at the opposite end of the spectrum from deportation, where there is undeniably a complete code within the Rules governing the deportee's rights under Article 8. The decision-maker is at the opposite end of the spectrum because there is no human rights code *at all* in a family visit visa case.

The Remaking of the Decision

24. I refer to the five point **Razgar** test. There is a substantial body of jurisprudence confirming the principle that family life is not established for the purposes of Article 8(1) unless there is a relationship of dependency and, where adults are concerned, that the ties between them go beyond normal emotional ties.

25. Miss Dogra submits that to impose such a threshold requirement in a family visit visa appeal is unfair because the requirement of dependency is antithetical to the requirements of paragraph 41.

26. I accept that where an applicant asserts a financial, emotional or physical dependency on the UK sponsor, this is likely to make it more difficult for the applicant to demonstrate that he or she satisfies the requirements of subparagraphs (i) and (ii) of paragraph 41. However, the Rules do not in terms debar applicants who are dependants on a UK sponsor, and so the **Kugathas** dependency criteria are not directly antithetical to the requirements of paragraph 41.

27. It is however true that imposing a requirement of dependency in a family visit appeal is likely to be an insurmountable obstacle in the vast majority of cases, thus rendering the Article 8 appeal right a nugatory one for meritorious claimants save insofar as they can rely on favourable findings of fact in the Article 8 appeal to buttress a fresh application under the rules.

28. Even on a generous interpretation of family life for the purposes of Article 8(1), I find that the claimants have not shown that questions 1 and 2 of the **Razgar** test should be answered in their favour. Although the claimant said in her application that she was financially dependent on her daughter and son-in-law, in his oral evidence Mr Shahid denied that this was the case. He denied sending any money to his mother-in-law for the purpose of providing additional financial support to her. He

explained that she lived not only with her dependent son, but also with two older sons who were financially independent and thus able to provide adequate financial support to the claimants without needing to obtain extra financial support from him.

29. The significance of the sponsor's evidence in this topic is not only that it negates the proposition that the claimant is wholly or mainly financially dependent on family in the UK, but it also casts doubt on the strength of the asserted family ties. For if the claimant was regularly in communication with her daughter and son-in-law in the United Kingdom, she would not have mistakenly represented that she was financially dependent on them.

30. As submitted by Mr Armstrong, it has also not been satisfactorily established that at the date of decision it was impossible or very difficult for the sponsor and his family to visit the claimants in Bangladesh. The sponsor clearly has the financial resources to fund such a visit, and even if he chose not to go himself, there was no reason why his wife and children could not have travelled out to Bangladesh for a visit during the school holidays.

31. The claimant has five children in the UK and three children living with her in Bangladesh. In her application form she only identified the sponsor and his immediate family as her "close" family members here. Furthermore, the only other family member whom she proposed to visit was her elder son. She did not apparently propose to visit any of her other three daughters living here.

32. In case I am wrong to find that Article 8(1) is not engaged, I shall consider the remaining questions in the **Razgar** test. In answer to question 3, I see no reason to disturb the favourable findings made by Judge Shamash as to the claimants' compliance with the requirements of paragraph 41. So the decision was not in accordance with the Immigration Rules.

33. However, I find that the decision was in accordance with the law because on the evidence available to the Entry Clearance Officer and the Entry Clearance Manager, the claimants had not shown that they met the requirements of subparagraphs (i) and (ii) of paragraph 41. The fact that the claimants were able successfully to deploy post-decision evidence so as to show that in retrospect they met the requirements of the Rules does not change the fact that the refusal decisions were lawful at the time that they were issued.

34. I find that the above consideration is determinative of the question of proportionality, having regard to Section 117B(1) of the 2002 Act which provides that the maintenance of effective immigration controls is in the public interest.

35. It remains open to the claimants to make a fresh application for entry clearance as family visitors, relying on the additional evidence deployed in their Article 8 appeal (and the favourable findings of fact made by Judge Shamash) to show that they meet the requirements of the Rules.

Decision

36. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimants' appeals on Article 8 grounds against the refusal of entry clearance as family visitors are dismissed.

Signed Date **24 November 2014**

Deputy Upper Tribunal Judge Monson