Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/03329/2017
HU/03340/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 September 2018	**On 16 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MR REZAUL KARIM (FIRST APPELLANT)
MRS NAHAR SHAMSUN (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr E Waheed, Counsel
For the Respondent: Ms A Everett, HOPO

DECISION AND REASONS

1. The appellants have been granted permission to appeal the decision of First-tier Tribunal Judge J K Swaney dismissing their appeals against refusal to grant them leave to remain in the United Kingdom on human rights grounds.

2. The appellants, who are husband and wife, are citizens of Bangladesh born on 1 January 1984 and 1 March 1989 respectively. The first appellant was granted leave to remain as a Tier 4 (General) Student on 23 November 2009 which was valid until 31 January 2012. The grounds of appeal state that he was then granted further periods of leave to remain in the UK, the most recent being valid until 15 September 2015. The second appellant entered the UK on 9 April 2015 as the dependant of the first appellant.

3. The grounds of appeal state that on 15 September 2015, the first appellant along with his dependent spouse, made an application for further leave to remain outside the Immigration Rules. That application was refused on 16 October 2015 because they had failed to pay the relevant immigration health surcharge (IHS). On 25 October 2015 they resubmitted the application for leave to remain. The application was refused on 16 May 2016 with an out of country right of appeal. The appellants put the respondent on notice that they intended to challenge the decision by way of judicial review following which the respondent agreed to reconsider the application. It is the decision made following reconsideration that is the subject of this appeal.

4. The appellants have a daughter who was born on 29 January 2016. At the date of the hearing before the First-tier Judge the second appellant was pregnant with their second child and the estimated due date was 25 July 2018.

5. The judge stated at paragraph 6 that the respondent considered the application under Appendix FM of the Immigration Rules and paragraph 276ADE of the Rules. Her letter refers to both appellants, however it is unclear that she has in fact considered the second appellant's circumstances as the letter was in her view extremely poorly drafted. The judge repeated at paragraph 73 that she has had regard to the fact that the respondent's decision letter does not appear to specifically refer to the second appellant because it I so poorly drafted. She went on to find in the same paragraph that she did not consider this to be a material factor because she has had the benefit of a detailed witness statement from the second appellant; of hearing her oral evidence; and of reading the evidence submitted in support of the appeal.

6. The judge concluded at paragraph 74 that having considered all of the factors in the round, including the best interests of the appellants' daughter, the respondent's decision did not give rise to unjustifiably harsh consequences for them. The respondent's decision is proportionate to the legitimate aim and is therefore lawful under section 6 of the Human Rights Act 1998.

7. The judge's decision led to an argument in the appellant's first ground of appeal of procedural unfairness. It was stated that as the judge had stated at paragraph 14 that there was no respondent's bundle, the judge ought to have adjourned the hearing. The judge should have decided

whether or not the respondent made any decision in respect of the second appellant. Although the notice of decision stated her name, no reasons were provided by the respondent. In the absence of a reasons for refusal letter, the judge did not have a valid appeal for the second appellant.

7. Mr Waheed relied on these grounds. He relied on the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, Rule 24.

8. Rule 24 states:

> *"(1) Except in appeals to which Rule 23 applies, when a respondent is provided with a copy of a notice of appeal, the respondent must provide the Tribunal with –*
>
> *(a) the notice of the decision to which the notice of appeal relates and any other document the respondent provided to the appellant giving reasons for that decision;*
>
> *(b) any statement of evidence or application form completed by the appellant;*
>
> *(c) any record of interview with the appellant in relation to the decision being appealed;*
>
> *(d) any other unpublished document which is referred to in a document mentioned in sub-paragraph (a) or relied upon by the respondent; and*
>
> *(e) the notice of any other appealable decision made in relation to the appellant.*
>
> *…"*

9. Mr Waheed said that Rule 24 requires the respondent to provide the notice of decision and include any other unpublished document referred to in the decision. He said that the Secretary of State referred to the applications made by the appellants in her letter dated 7 February 2017. He said the judge did not have the necessary documents, that is the notice of decision to which the notice of appeal relates. The first appellant lodged an appeal. As there was no decision by the respondent in respect of his wife (second appellant), she should not be treated as someone with an adverse decision. Consequently, she awaits a decision which the second ground relies on.

10. The second ground, however, states that the judge materially erred in failing to assess whether it is reasonable for the child to relocate to Bangladesh, that being the relevant test under Section 117B(6) NIAA 2002. It appears that the judge accepts that this is not a case where the

child (or the child's mother) would be expected to or have to leave the UK. Given that acceptance, the judge has erred in failing to grapple with Section 117B(6). I failed to see the link between the first and second grounds of appeal.

11. Mr Waheed said that the third ground depends on the first ground. The third ground argued that the judge did not identify any powerful reasons justifying the relocation or separation of the child from the appellant and relied on paragraphs 35 and 46 of **MA (Pakistan) and Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) and Anor [2016] EWCA Civ 705**.

12. Ms Everett said that all the applications that have been made by the first appellant were made with his spouse. The second appellant submitted a witness statement. Her understanding is that there was one application. The judicial review applications were brought up as one and the application made to the Secretary of State was also made as one application naming both the first and second appellants. She said it was clear from the immigration history and the appellants' supporting documents that the applications were made together and the issues relied on were identical.

13. With regard to the second ground, she said that as the child is not a qualifying child, the second ground has not been made out.

14. Consequently, she argued that ground 3 falls away completely.

15. Ms Everett submitted that the issue raised in the ground in respect of Rule 24 of the First-tier Tribunal Procedure Rules was not raised in the First-tier hearing or in the statements. There was no dispute about this in the immigration history provided in the grounds of appeal. She could not see what information was missing that could have changed the outcome of the hearing.

16. Mr Waheed submitted that the situation remains the same as the first point. The Tribunal was not aware because of the failure to provide documents which the respondent was obliged to provide under Rule 24, whether the second appellant was subject to an immigration decision requiring her to leave the UK. If she was not, that is a material factor which goes to whether it is proportionate to give effect to the judge's decision with regard to the first appellant. He said the Secretary of State cannot demonstrate that the second appellant is subject to any decision.

17. I was not persuaded by Mr Waheed's argument. I have had regard to Rule 24 of the First-tier Tribunal Procedure Rules.

18. I find that the respondent provided the necessary information and documents that were relevant to the disposal of this appeal. The

appellants were represented below by Counsel, Ms Ferguson and she did not raise this matter as an issue before the judge.

19. The letter dated 7 February 2017 from the Home Office to the appellants' solicitor accompanied the Reasons for Refusal Letter ("RFRL"). Annex A of the RFRL named both appellants. In the grounds of appeal lodged by the appellants' solicitor, under relevant facts, it said that there were two appellants and that reference to the appellant was to the lead appellant, Mr Rezaul Karim. Paragraph 3 of the grounds of appeal states that the appellant along with his dependent wife made a further application for leave to remain in the United Kingdom outside the Rules on 15 September 2015 as his spouse was pregnant. I do not read into this that the first appellant's spouse made an application in her own right and separate from that of her husband.

20. Indeed, the grounds of appeal lodged against the respondent's decision relied heavily on the first appellant's circumstances in that he had been in the UK for seven years and could not return to his country of origin with his spouse and child. There was no separate reference to the circumstances of the second appellant as being different from those of the first appellant.

21. On the evidence I do not find that the second appellant is due a decision or is awaiting a decision from the Secretary of State. I find that the first ground is without merit.

22. I also find that the second ground is without merit. This ground relies on Section 117B(6) of the NIAA 2002. In fact, ground 2 recites Section 117B. The requirement in subparagraph (b) is that "the person has a genuine and subsisting relationship with a qualifying child"; subparagraph (c) states "and it would not be reasonable to expect the child to leave the UK." Qualifying child is defined in s117D(1) as meaning "a person who is under the age of 18 and who (a) is a British citizen, or (b) has lived in the UK for a continuous period of seven years or more." On the facts, the child, who was born in the UK on 29 January 2016 and is 2 years old, cannot be considered to be a qualifying child. At her age, the child is totally dependent on her parents. The child's best interest is to be with her parents. The appellants and their child/children would be removed to Bangladesh together as a family unit. This ground is also without merit. This finding also applies to the third ground. Therefore, the judge's findings at paragraph 66 were open to her and disclosed no error of law.

23 The judge's decision dismissing the appellants' appeal shall stand.

24. No anonymity direction is made.

Signed Date: 8 October 2018

Deputy Upper Tribunal Judge Eshun