**Upper Tribunal**
**(Immigration and Asylum Chamber)**

**Appeal Number: HU/03518/2015**
**HU/03526/2015**
**HU/03531/2015**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 5 April 2018** | **On 1 May 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SYMES**

**Between**

**RUNA BEGUM**
**ASRAF ALI AROS**
**FOYSAL MIAH**
(ANONYMITY ORDER NOT MADE)

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr K Shikder (Tower Hamlets Barristers Chambers)
For the Respondent: Ms J Isherwood (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. These are the appeals of Asraf Ali Aros (born 20 December 1963), Foysal Miah (whose date of birth has been disputed), and Runa Begum (born 8 October 1999), citizens of Bangladesh, against the decision of the First-tier Tribunal of 25 April 2017, itself brought against the refusal of their applications for entry clearance as the partner and children of the Sponsor Mrs Begum, dated 8 July 2015.

2. The applications were made on the basis that the family members wished to join the Sponsor. Mr Aros had married her in 1985, and she went to the UK to settle in

September 2012. They stayed in touch by telephone although had not met in person since she departed for the UK.

3. The applications were refused because

(a) The childrens' birth certificates were issued only on 22 November 2014 and were therefore thought untrustworthy given the general evidence of the unreliability of documents from Bangladesh; the genuineness of the marriage certificate was similarly doubted;
(b) There was no evidence of contact between the Sponsor and family via photographs or otherwise;
(c) Home Office records showed that Foysal Miah (who supplied a birth date of 5 September 1998) had been previously been refused an application to come to the UK as a Working Holidaymaker in the name Foysal Ali (born 18 September 1985);
(d) HMRC checks recorded no earnings as having been declared for the Sponsor for the years ending April 2015 and April 2016;
(e) The required evidence by way of accounts, bank statements and evidence of tax and national insurance payments under Appendix FM–SE had not been provided;
(f) Checks against the electoral register recorded that the Sponsor was not registered at the address at [ ].

4. Grounds of appeal to the First-tier Tribunal argued that the wrong standard of proof had been supplied, that the approach taken to the documentary evidence of the childrens' births was countered by DNA evidence of parenthood that the Sponsor had established that she earned over £25,000 annually and that the decisions to refuse entry clearance were disproportionate. Supporting evidence included a DNA report from Cellmark of February 2015 stating that there was an overwhelming probability that Hazera Begum was the mother, and Asraf Ali Aros the father, of Runa and Foysol. A HMRC return for the year ending April 2015 recorded net profit of £25,062 from the Sponsor's business.

5. The First-tier Tribunal recorded evidence from the Sponsor Mrs Begum that she was a British citizen with six siblings and four step-siblings, all British citizens, living and working in the UK. Foysal Miah had not made an application which had previously been refused, and the date of birth said to have been given in any such application would have post-dated her marriage to her husband by only four months. She visited her family in 2014. They kept in touch by telephone, Skype and other social media (telephone cards were provided in support of this assertion).

6. She worked as a tailor, her accounts showing net pre-tax profits of £25,062 for the year ending April 2015 and £25,984 for the year ending April 2016. Her husband was a successful businessman in Bangladesh, employing Foysal Miah, and had no

need for financial support from his wife. She produced tenancy agreements recording that she presently rented two bedrooms in a four-bedroom house at [ ], which would provide enough room for her family members. One of her rented bedrooms presently housed her business; if entry clearance was granted, then she might have to look for alternative employment.

7. Her advocate Mr Shikder made submissions before the First-tier Tribunal arguing that the appeal should be allowed because there had been a disproportionate interference with the Appellants' family life. Foysal Miah had made "a silly mistake very naively" in denying the fact of his previous application but one that was not sufficient to justify the appeal being dismissed.

8. Faced with that evidence, the First-tier Tribunal made the following findings, noting that the appeal was brought on human rights grounds alone:

(a) Family life was established on balance of probabilities, given the marital status of Mr Aros and Mrs Begum, the DNA evidence of their childrens' parentage and the Sponsor's unchallenged evidence that her husband and children wished to join her so that they could all enjoy the love, comfort and happiness of normal family life – other evidence of family life was "not particularly satisfactory", in that there was no real explanation provided for the Sponsor's sudden decision to move to the UK in 2012, after 27 years of marriage, and the telephone cards "did not advance the case for family life very far".
(b) The decision denying entry clearance amounted to a material interference with family life.
(c) The decision was in accordance with the law save for one concern.
(d) The decision was proportionate, as it was not shown that the refusal was unjustifiably harsh. Whilst the evidence ostensibly showed that there were sufficient earnings to meet the Appendix FM requirements, it was not possible to accept that adequate maintenance and accommodation were both at once available. The financial requirements of Appendix FM could be met only via the Sponsor's earnings from her business, but that business would be terminated were she to use the room it presently occupied to house family members. There was no evidence of attempts to find alternative employment or accommodation.

9. The First-tier Tribunal addresses the question of the general refusal reason based on deception at two points in its decision.

(a) At para 31 the Panel states that the Entry Clearance Officer had identified no aggravating circumstances sufficient to raise Rule 320(11);
(b) At paras 48-50, the Panel goes on to conclude that although there was no direct evidence before it to corroborate the Respondent's claim of an earlier application by Foysal Miah, which was a serious accusation, it appeared to be backed up by fingerprint evidence and there was no witness statement

from Mr Miah to explain himself further, and in submissions the accuracy of the allegation had not been denied by the family's advocate.

10. Grounds of appeal argued that the balance of probabilities had not been properly applied and a "heavier standard of proof" had been required, given the First-tier Tribunal's references to the financial requirement being satisfied at one point in their decision. It was wrong to tarnish the application of Ms Begum and Mr Aros with the dishonesty found to be established with respect to Mr Miah. It was wrong to determine the appeal based on a hypothetical situation that might or might not arise in the future.

11. Although the First-tier Tribunal refused permission to appeal, the Upper Tribunal granted the same on 23 January 2018, on the basis that there were arguable errors of law in the findings as to whether adequate accommodation was available and whether the financial requirements were met, and in relying on deception by one Appellant notwithstanding a finding elsewhere that Rule 320(11) did not bite.

12. Before me Mr Shidker submitted that the First-tier Tribunal had effectively accepted that the general refusal reason was not made out. Rule 320(11) required that deception be established, plus aggravating circumstances, and here the Respondent had simply failed to put a case on the latter issue. The financial requirements were met having regard to the strictures of Appendix FM–SE: all relevant evidence was before the First-tier Tribunal. As to the accommodation, it was foreseeable that the Sponsor, given her earnings and the fact that everyone in her extended family worked and that the Appellant and at least one child were themselves already employable, could find an alternative place to live in the future.

13. Ms Isherwood replied that the First-tier Tribunal had found that one Appellant had acted dishonestly and was thus entitled to rely upon Rule 320(11) as a public interest reason suggesting that the entry clearance refusal was generally proportionate. The requirements of Appendix FM–SE were not established as satisfied: for example no statements from a business bank account had been supplied. The decision of the First-tier Tribunal regarding the financial requirements and accommodation was one to which it could legitimately come. She provided a copy of relevant sections of the Housing Act 1985, which provides that whilst children under the age of ten do not count as adults for the purposes of assessing statutory overcrowding; however, two rooms are to be treated as overcrowded if they house more than three individuals of a greater age.

14. The parties were agreed that were I to identify a material error of law in the First-tier Tribunal decision, I should go on and finally determine the appeal based on the materials before me.

**Findings and reasons**

15. It seems to me that the First-tier Tribunal erred in law in its decision. Firstly, its reasoning as to the public interest ground is seriously confused. The only ground of "General refusal reason" that was put in issue by the decision letter (and this was confirmed before me by Ms Isherwood) was Rule 320(11).

> "**Part 9: grounds for refusal**
> **General grounds for the refusal of entry clearance, leave to enter or variation of leave to enter or remain in the United Kingdom**
> **320**. In addition to the grounds of refusal of entry clearance or leave to enter set out in Parts 2-8 of these Rules, and subject to paragraph 321 below, the following grounds for the refusal of entry clearance or leave to enter apply:
> …
> Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused …
>
> (11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by: …
>
> (iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not);
>
> and there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process."

16. As can readily be seen, this is a discretionary reason for refusal. It requires both the identification of a positive act that constitutes dishonesty or some other breach of immigration law, combined with "other aggravating circumstances". Ms Isherwood was able to point to no such factor on the facts of this case. Accordingly I find that the First-tier Tribunal was right in the first assessment it made on public policy grounds and wrong to ostensibly revisit that question when it reverted to consider the matter outside the Rules. As Lord Carnwath stated in *Patel* [2013] UKSC 72 stated at [55] that "the balance drawn by the rules may be relevant to the consideration of proportionality". It seems to me to be wrong to take a different approach when considering the appeal by reference to a staged and evaluative consideration of the proportionality of an immigration decision than that identified by the Rules themselves.

17. Secondly, it seems to me that the First-tier Tribunal took the wrong approach to the assessment of the financial and accommodation requirements.

18. The Immigration Rules provide:

"**Appendix FM**

…

**Financial requirements**

**E-ECP.3.1.** The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-

(a) a specified gross annual income of at least-

(i) £18,600;

(ii) an additional £3,800 for the first child; and

(iii) an additional £2,400 for each additional child ...

**[Accommodation]**

**E-ECP.3.4.** The applicant must provide evidence that there will be adequate accommodation, without recourse to public funds, for the family, including other family members who are not included in the application but who live in the same household, which the family own or occupy exclusively: accommodation will not be regarded as adequate if-

(a) it is, or will be, overcrowded; or

(b) it contravenes public health regulations. …

**Appendix FM-SE: family members specified evidence**

**7.** In respect of self-employment in the UK as a partner, as a sole trader or in a franchise all of the following must be provided:

(a) Evidence of the amount of tax payable, paid and unpaid for the last full financial year.

(b) The following documents for the last full financial year, or for the last two such years (where those documents show the necessary level of gross profit as an average of those two years):

(i) annual self-assessment tax return to HMRC (a copy or print-out); and

(ii) Statement of Account (SA300 or SA302).

(c) Proof of registration with HMRC as self-employed if available.

(d) Each partner's Unique Tax Reference Number (UTR) and/or the UTR of the partnership or business.

(e) Where the person holds or held a separate business bank account(s), bank statements for the same 12-month period as the tax return(s).

(f) personal bank statements for the same 12-month period as the tax return(s) showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.

(g) Evidence of ongoing self-employment through the provision of at least one of the following: a bank statement dated no more than three months earlier than the date of application showing transactions relating to ongoing trading, or evidence dated no more than three months earlier than the date of application of the renewal of a licence to trade or of ongoing payment of business rates, business-related

insurance premiums, employer National Insurance contributions or franchise payments to the parent company.
(h) One of the following documents must also be submitted:

(i)

(aa) If the business is required to produce annual audited accounts, such accounts for the last full financial year; or
(bb) If the business is not required to produce annual audited accounts, unaudited accounts for the last full financial year and an accountant's certificate of confirmation, from an accountant who is a member of a UK Recognised Supervisory Body (as defined in the Companies Act 2006) or who is a member of the Institute of Financial Accountants;

(ii) A certificate of VAT registration and the VAT return for the last full financial year (a copy or print-out) confirming the VAT registration number, if turnover is in excess of £79,000 or was in excess of the threshold which applied during the last full financial year;
(iii) Evidence to show appropriate planning permission or local planning authority consent is held to operate the type/class of business at the trading address (where this is a local authority requirement); …"

19. It can be seen that the Rules set out a very precise framework by which the adequacy of maintenance is to be assessed, and they do so by a wholly retrospective calculation, focussed on the period prior to the date of application. On the other hand, the Rule addressing the future housing arrangements posits the question whether "there *will be* adequate accommodation". So I do not consider it was correct for the First-tier Tribunal to find an inconsistency in the proposed arrangements. An applicant under Appendix FM is entitled (indeed, is required) to rely on historic earnings yet put their case on accommodation based on future rather than present arrangements.

20. For these reasons, then, I find that the decision of the First-tier Tribunal is flawed by material error of law and cannot stand. As the findings required to finally determine the appeal are relatively limited, I shall accede to the invitation by the parties to finally determine the appeal.

21. There is no challenge to the findings below as to the existence of family life with which the immigration decision will interfere. The decision is plainly in accordance with the law and for a legitimate aim (maintaining immigration control). So the question for me is essentially one of proportionality.

22. As noted in *Adjei (visit visas – Article 8)* [2015] UKUT 261 (IAC), it is necessary to be satisfied that Article 8 ECHR is engaged before embarking on consideration of the

Immigration Rules, given that their subject matter is most likely to be relevant to the proportionality of the decision; as the Tribunal put it in *Kaur* [2015] UKUT 487 (IAC), "utilising the analysis of Richards LJ in *SS (Congo)* [2015] EWCA Civ 387 , we do not discern any significant gap between the … rules and "what Article 8 requires". Notwithstanding the fact that the decision in *SS (Congo)* was overturned by the Supreme Court in *MM (Lebanon)* [2017] UKSC 10, therein Lady Hale and Lord Carnwath confirm this reasoning remains extant §77: "Instructions … have to be taken into account as part of the overall scheme: on the one hand, they might so mitigate the effects of the Rules as to make them compatible with the Convention rights when they would not otherwise have been so". So accordingly the balance struck by the Rules is very relevant when determining whether an immigration decision is proportionate.

23. When an application is assessed on appeal, the exercise necessarily takes place outside the Rules, given the direct reference in the only ground of appeal to the Human Rights Act 1998, rather than to the Rules. However, as noted in *Patel*, the Rules are very likely to be of significant importance, and if they are not met, then only a compelling case will suffice. I acknowledge that there may not always be a perfect match between the requirements of the Immigration Rules and those of Article 8 ECHR, but it seems to me that there is a high level of consonance between the requirements of the Rules and the making of proportionate decisions under Appendix FM and so I will give central attention to whether the Rules are indeed met.

24. Reviewing the Appellant's bundle of supporting evidence, it appears to me that the requirements of Appendix FM–SE are met by evidence extending over the relevant period before the application was made. There is evidence of the relevant tax liability, self-assessment tax returns and HMRC statements of account, confirmation of registration with HMRC bearing the Appellant's tax reference number, evidence of the income being paid into the Sponsor's personal bank account including recent bank statements, and a copy of the business accounts. Contrary to Ms Isherwood's submission, there is no requirement that funds be paid into a business bank account when relying earnings from self-employment. So I accept that the financial requirements of the Rules are satisfied.

25. That leaves the question of accommodation. This is a case where the Sponsor has shown herself to be an established businesswoman who has maintained herself in adequate accommodation for a significant period. Following the arrival of her family members here she will have the advantage of their ability to find work, too; the evidence that her husband is a successful businessman has not been challenged.

26. It seems to me to be somewhat unrealistic to expect the Appellant to incur the expense of accommodation well beyond her present needs for a very significant period before her family members arrive here. This is demonstrated in this case by the chronology: the application was made almost three years ago, on 14 May 2015, and it took the Entry Clearance Manager six months to even conduct a preliminary

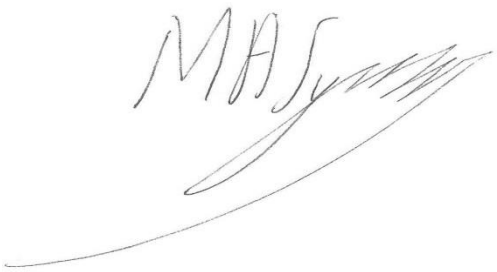
review of their own decision on 17 November 2015. It seems to me that a family unit with a track record of supporting themselves via their own entrepreneurialism, and who understand full well the precise requirements of the Rules on accommodation, can be trusted to ensure that their future housing arrangements are fully compliant with the legislation on overcrowding.

27. Additionally, having regard to the matters that Parliament has endorsed as requiring attention routinely in a judicial evaluation of proportionality as set out in section 117B of the Nationality Immigration and Asylum Act 2002, I note that the Secretary of State has not suggested that there is any reason to consider that the Appellants will be at any disadvantage in integrating because of their English language ability, and they have always been financially independent. The Sponsor has always been present lawfully in the UK and a single Appellant's historic act of dishonesty was relatively minor, committed during their childhood, and did not reach the "aggravated" level which the Rules themselves identify as the relevant benchmark. I accordingly find that the interference with family life occasioned by the decision appealed against is disproportionate to the public interest it aims to achieve, and I allow the appeals.

Decision:

The decision of the First-tier Tribunal contained a material error of law.
I have re-considered the appeals and I allow them because the refusals of entry clearance were contrary to the Human Rights Act 1998.

Signed: Date: 5 April 2018



Deputy Upper Tribunal Judge Symes