Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13286/2019 (V)**

THE IMMIGRATION ACTS

Heard by Skype for business
On the 19th May 2021

Decision & Reasons Promulgated
On the 21st June 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE ENTRY CLEARANCE OFFICER

Appellant

AND

FERDOUSI AKTER NASRIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz , Senior Presenting Officer
For the Respondent: Mr Jesurum, Counsel on behalf of the respondent.

DECISION AND REASONS

1. The Entry Clearance Officer appeals with permission against the decision of the First-tier Tribunal Judge Bonavero (hereinafter referred to as the "FtTJ") promulgated on the 19 November 2020, in which the appellant's appeal against the decision to refuse her application for entry clearance to settle in the UK to join her husband and sponsor was allowed.

2. The FtTJ did not make an anonymity order, and no grounds or submissions were provided for such an order to be made.

3. The hearing took place on 19 May 2021, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face- to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the sponsor so that he was able to hear and see the proceedings being conducted. There were no issues regarding sound, and no problematic technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

4. Whilst this is the appeal of the ECO I intend to refer to the parties as they were before the FtTJ.

5. The appellant is a national of Bangladesh. There is no dispute as to the factual background of this appeal as set out in the decision of Judge Bonavero.

6. In an application made on 16 April 2019 the appellant applied for entry clearance to enter the UK and settle with her husband and sponsor. The sponsor is a British citizen and in April 2000 he married his 1st wife and together they had 3 daughters all of whom are minors and are British citizens.

7. On 20 September 2017 the sponsor's wife died. The sponsor took over the children's primary care and since that time worked part-time. His mental health suffered and there were concerns as to being able to meet the needs including the emotional needs of the children. The sponsor wanted to remarry, and an arranged marriage took place with the appellant on 31 August 2018. His daughters travelled with him to the wedding and meet the appellant in Bangladesh. In July 2020 the appellant suffered a heart attack remaining in hospital for a period of 4 days.

8. On the 16 July 2019 the respondent refused the application. The Entry Clearance Officer (hereinafter referred to as the "ECO") considered the application under Appendix -FM but gave the following reasons for refusing the application.

9. The appellant could not meet the requirements of the Immigration Rules as she could not meet the minimum income requirement. It was accepted that she could meet the English language requirement.

10. In respect of Article 8 the ECO set out that he was satisfied that there were no exceptional circumstances leading to any unjustifiably harsh consequences for the appellant or the sponsor which had been identified. Whilst it was suggested that the appellant's presence was required in the UK to care for the sponsor's children from his previous marriage it was noted that the children were not disabled or handicapped in any way. The sponsor continued in self-employment whilst the children remained in education in the UK. He had been

able to establish a routine work/life/childcare balance in the UK by himself with support from others and there was no indication that this could not continue. It was noted that the appellant's presence would be likely to result in further recourse to public funds. When considering whether there were any exceptional circumstances, the ECO was not satisfied that any circumstances had been put forward which were "exceptional". Any family life could be maintained by visits. The ECO concluded that the application did not fall for a grant of entry clearance outside of the rules.

11. The appellant's appeal against the respondent's decision to refuse entry clearance came before the First-tier Tribunal on the 29 October 2019. In a determination promulgated on the 19 November 2019, the FtTJ allowed the appeal on human rights grounds. At paragraphs [14]-[23] the FtTJ set out his findings of fact and conclusions on the appeal.

12. In summary, the First-tier Tribunal Judge observed that there was little dispute between the parties about the facts of the case and that it was "the manner in which article 8 should be applied to those facts " formed the a substance of the appeal before him. He further observed that the case on behalf the appellant was not argued primarily on the basis that the decision was a disproportionate breach of her article 8 rights but that the decision would result in unjustifiably harsh consequences for the sponsor and the sponsor's children. At [16] the judge referred to the circumstances of the sponsor's children and that their lives had been "coloured by tragedy and that they had lost their mother when they were very young". In respect of the sponsor the judge found that the children were now being looked after by their father alone and that he had been plainly affected by his 1st wife's death and as a result of had serious health problems. At [17] the judge set out the documentary evidence in support of the appellant's claim which related to the circumstances of the children and those of the sponsor which related to their best interests.

13. The judge took into account that the girls had only met the appellant on one occasion at the time of their marriage and whilst they had been in communication since that time he concluded that the relationship remained superficial.

14. The judge addressed the issue of whether it was in the best interests of the children for them to live with both of their parents at [19 – 20] and took into account that the appellant was not the children's natural mother and that it was not always necessarily the position that the best interests of the children were to live with a stepmother with whom they only had limited contact. Having taken that into account and looking at the evidence, the judge concluded that it would be the children's best interests of the appellant to join them in the UK. He found that the sponsor had done his best look after children that it was "plainly difficult look after 3 girls alone". He found that the family were united in the view that the appellant's presence would be positive for them given the loss of their mother at a young age and their father's recent heart attack, the judge

found that it would be helpful for the children to have the opportunity to develop their relationship with the appellant.

15. As to whether or not family life could be established in Bangladesh and outside of the UK, the judge reached the conclusion that it could not for the reasons set out at [20] taking into account the children's British nationality and their length of residence but also taking into account the trauma which they had been exposed to and the fact that they were all in full-time education. He therefore concluded that it would be in their best interests for the appellant to be granted entry clearance.

16. The judge then considered the proportionality of the decision and in the light of his finding that the family could not be expected to relocate to Bangladesh and the proportionality of the appellant's continued separation from the sponsor. The judge took into account the public interest considerations under S117A and B and at [22] concluded that in his judgement this was a case where the "compelling nature" of the circumstances were such that it would be disproportionate to refuse the application. In respect of section 117B(3) and the financial requirements, the judge accepted the sponsor's evidence that his ability to support the family been affected by the fact that he was the sole care of the children. The judge reached the conclusion on the evidence that it was the appellant's presence which would be likely to allow him to work more hours and thus be in a position to earn sufficient income for his family and thus it would follow that the entry of the appellant would not be a burden on the public finances. At [23] the judge concluded that it was "an unusual case in which 3 children affected have lived through considerable trauma". The judge found that the sponsor done his best look after his daughters alone, but this had plainly affected his physical and mental health. He therefore concluded it would be to a disproportionate breach of their Article 8 rights to refuse entry clearance to the appellant.

17. He therefore allowed the appeal.

18. Permission to appeal was issued and permission to appeal was granted by FtTJ Chohan on 18 December 2020. The FtTJ stated:

> "When one considers the judge's decision as a whole, it may be open to argument that the judge erred in finding that there are compelling or exceptional circumstances in this case. It is clear from the decision that the judge had considerable sympathy for the appellant and the children, but in light of the judge's findings at paragraph 17 and 18 that the relationship between the appellant and the children remain somewhat superficial, I find there is an arguable error of law."

<u>The hearing before the Upper Tribunal:</u>

19. In the light of the COVID-19 pandemic the Upper Tribunal (Judge Rintoul) issued directions on 5 January 2021. Upper Tribunal Judge Rintoul reviewed the

file and in his directions issued indicated that the appeal should be determined without a face- to- face hearing and directions were given for a remote hearing to take place and that this could take place via Skype.

20. The hearing was therefore listed as a remote hearing with both advocates providing their oral submissions.

21. Mr Diwnycz, Senior Presenting Officer appeared on behalf of the ECO. He relied upon the written grounds. No further oral submissions were made.

22. Mr Jesurum of Counsel who had appeared on behalf of the appellant before the FtTJ relied upon the further submissions sent on the 4 March 2021.

23. In his oral submissions he submitted that the ECO's grounds centred upon paragraph 22 and where the judge stated "the appellant circumstances" however that would appear at 1st glance to be an error but that on any view the appellant's "circumstances" included the effect on those affected by the decision (applying Beoku-Betts at paragraphs 43 – 44) and that the judge had plainly taken into account the sponsor's heart attack and the family bereavement. Alternatively, he submitted the word "appellant "was a slip of the pen and the judge clearly intended to refer to the sponsor's circumstances.

24. Mr Jesurum submitted that there had been no challenge the law or challenge to the facts and that the submission made on behalf of the respondent essentially was that the circumstances were not "compelling" however that was not a submission of law and that if the judge had considered the correct legal test taken into account the relevant considerations it was open to the judge to make the decision that he did.

25. At the conclusion of the hearing, I reserved my decision which I now give.

Decision on error of law:

26. The grounds advanced on behalf of the respondent to those set out in the written application made on 1 December 2020 and are those that are relied upon by Mr Diwnycz on behalf of the respondent. No further grounds or elucidation of those grounds have been provided.

27. In essence they submit that firstly there are no particularly strong features in this appeal based on the lack of contact between the appellant and the children and that "the sponsor being a single parent with some health issues" is not "exceptional" (at paragraphs 5 – 7), and the refusal of entry clearance is not disproportionate, and it is argued that it is not been shown there is family life and that there are no exceptional circumstances leading to any unjustifiably harsh consequences.

28. Mr Jesurum on behalf of the appellant submits that none of those submissions demonstrate an error of law in the decision of the FtTJ and that the assertion

made that there is nothing "exceptional" about "the sponsor being a single parent with some health issues" is an assertion of fact and not law.

29. Thus he submits that the circumstances of the sponsor and the children were relevant factors and that the circumstances of the sponsor bringing up 3 children alone after the death of their mother and having suffered mental health problems and also a recent heart attack are matters of weight. Given that an Article 8 assessment is "fact sensitive "he submits that those are matters of weight for the factfinder and in this case the FtTJ.

30. He further makes the point that the judge's analysis and factual findings that the circumstances are "compelling" this can only be challenged on the basis of the ground of perversity or irrationality and here there is no such challenge advanced on behalf of the respondent either in the grounds or in any oral submissions.

31. The last point he makes is that even if the Article 8 proportionality assessment may be viewed as generous, that is not a ground of challenge.

32. Having considered the grounds in the light of the submissions of the advocates and the decision of the FtTJ I consider that the submissions made by Mr Jesurum are persuasive. There was no dispute that the appellant could not meet the rules under Appendix FM on the basis that the sponsor could not meet the financial threshold required (see paragraph 9) and therefore the thrust of the appeal was whether the respondent's decision would result in "unjustifiably harsh consequences" (see paragraph 9).

33. The FtTJ correctly identified the legal test he was required to carry out and identified at [15] that the appeal did not solely relate to the Article 8 rights of the appellant but also the effect of the refusal upon the relevant family members which were the appellant's husband and sponsor but also the sponsors children and therefore the appellant's stepchildren who were "children of the family" (see paragraph 15). This was consistent with the decision of Beouku-Betts v SSHD [2009] AC 155 and that Article 8 appeals require analysis of all those affected by the decision. A person outside of the UK may have a good claim under Article 8 to be allowed to enter the UK to join family members already there so as to continue or develop existing family life (see SSHD v SS (Congo) [2015] EWCA Civ 387. It is also the position that Article 8 imposes no general obligation on the state to facilitate the choice made by married couple to reside in it (see Huang at [18] and Abdelaziz, Cabale and Balkandali v UK (1985) & EHRR 431. As to family life, there was no dispute in the decision letter that the appellant was married to the sponsor and that the relationship was a genuine and subsisting one.

34. When considering the circumstances of the family, the FtTJ observed that there was no dispute as to the factual circumstances and the evidence in support (see paragraph 14).

35. The following factors were identified by the judge. The children's lives had been "coloured by tragedy" having lost their mother when they were very young in September 2017 (paragraph 16) and they were looked after by the sponsor's only. The sponsor had been "plainly affected by his wife's death had serious health problems" (paragraph 16). The sponsor suffered a heart attack in July 2020 and had remained in hospital apart from his children for a period of 4 days. There were issues relating to his mental health. The factual evidence referred to the sponsor having struggled to address the needs of the 3 children and was worried about the impact upon them (see letter page 35/3/2019 from family GP and referred to by the FtTJ at paragraph 17). The letter from the health Centre dated 28/9/17 was consistent with that and there was evidence of the family's referral (at page 32AB). Similar evidence was set out at page 33 of the bundle referred to by the judge at paragraph 17. The children themselves were reported as having stated they were looking forward to the stepmother the appellant joining the family unit.

36. Against that factual background, the judge considered the adverse factors identified which included the limited nature of the contact between the appellant and the children (at [18]) along with the fact that the appellant could not meet the Immigration Rules and in particular the financial requirements (paragraph 9).

37. The FtTJ addressed the best interests of the children concerned. A section 55 consideration is capable of forming a factor relevant proportionality (see GEN 3.1 – 3.3). A decision-maker must take into account as a primary consideration the best interests of any relevant child or children. A "relevant child" is defined in GEN 3.3.2 as "a person under 18 at the date of the application and (b) it is evident from the information provided by the applicant they would be affected by the decision to refuse the application."

38. Again the grounds do not challenge the "best interests assessment" set out at paragraph [20] and the judge correctly identified that they ranked as a "primary consideration" but were not dispositive of the appeal. Having considered the factual background of the appeal, he concluded that it was in the best interest of the children for the appellant to join them in the UK. The judge found that the sponsor had done his best to care for the children but that it had been "plainly difficult for him to look after the 3 girls alone". The judge took into account that all family members were "united in their view that the appellant's presence would be positive for them" alongside the loss of their mother at a young age and their father's recent heart attack the judge stated, "I find it will be helpful for the children to have the opportunity to develop their relationship with the appellant." At [20] the judge found that family life could not be established in Bangladesh as this would have the effect of uprooting the children from the UK. They were British citizens, and had always lived in the UK and the FtTJ further took into account that establishing family life outside of the UK would not be in their best interests as a result of the "trauma to which they had been exposed". The Court of Appeal in Lal v SSHD [2019] EWCA Civ 1925 indicated that one

has to look at the factors relied on in an objective sense rather than on the basis of what the appellant and/or the appellant's spouse perceive to be the difficulties and that when determining the question of whether return would entail "very serious hardship". This was consistent with the assessment made based by the FtTJ and this assessment has not been challenged by the respondent.

39. As Mr Jesurum submitted there is no legal error either advanced in the grounds or that can be seen in the best interests assessment carried out by the FtTJ.

40. The issue that arises from the grounds relates to the proportionality of the decision. It is here that the respondent submits that there are "no particularly strong features". However in setting out in the grounds, they do not take account of the factors identified by the judge in relation to the sponsor and the children. While the respondent considers the sponsor "being a single parent with some health issues" is not exceptional, that was not the view of factual finding of the FtTJ.

41. In addressing proportionality of the decision, the judge took into account the public interest considerations listed in section 117B. As set out section 117A(2)(a) provides in mandatory terms that the "court or tribunal must (in particular) have regard in all cases to the considerations listed in section 117B. The judge was entitled to weigh in the balance that there was no dispute as to whether she met the English language requirements of Appendix FM as set out and reflected in section 117B (2).

42. The grounds seek to challenge the reference made by the judge to the decision in Rhuppiah v SSHD [2018] UKSC 58 and his judgment that the compelling nature of the appellant circumstances were such as to override the general normative guidance set out in section 117B(3).

43. To consider that submission is necessary to set out the nature of the challenge to paragraph 21. The respondent advances the challenge on the basis that this was a misdirection because the appellant had not shown that her circumstances were exceptional so as to be exempt from the statutory requirements and that the judge had not given any adequate reasons.

44. Having considered the decision as a whole, it is clear that at paragraph [22] the judge was seeking to make the point there will be cases where the weight attached the public interest will be less where the facts concerned are "particularly strong or as the judge went on to stated [22] were "compelling".

45. The reference to the decision in Rhuppiah concerned that set out at paragraph [49] where the court made reference to the section 117B factors and that the effect of the provisions cannot put the decision-maker in a "straitjacket" and concluded that section 117A(2)(a) was a section which provided the limited degree of flexibility.

46. The reference to section 117B (3) and the financial requirement is then explained by the judge at [22]. From reading that paragraph it appears that he accepted the submission made on behalf of the appellant that the sponsor's ability to support the family was affected by his position as the sole carer of the children (as set out his witness statement and evidence). It was open to the judge to reach a finding of fact that the appellant's presence would be likely to allow him to work more hours and therefore be in a position to earn sufficient money and income for the family so that they were not a burden on the public finances. I agree with Mr Jesurum that this was not a speculative finding but one which was based on sponsor's evidence which the judge plainly accepted.

47. Whilst the judge referred to the compelling nature of the appellant's circumstances at [22], it is also clear as Mr Jesurum submitted that the judge was referring to the sponsor and those of the children as well as the appellant and that was plain from reading paragraph 23.

48. The judge concluded that he found the facts that were before him when considered together were "compelling" and referred to this being a case which had "unusual facts" where there were 3 children whose best interests he had factored into the proportionally assessment and who had been affected by "considerable trauma" and that the circumstances had had a serious adverse effect upon the sponsor in terms of his physical and mental health. As family life could not be established in Bangladesh in the light of the children's circumstances, including their British citizenship and the trauma that they had undergone, that the refusal of entry clearance would lead to an unjustifiably harsh consequences upon the appellant and her family members. That was in accordance with the decision in Agyarko, that even when the requirements are not met an applicant may still be granted leave "outside the Rules" on the basis of if the consequences of refusal are "unjustifiably harsh".

49. The judge gave adequate and sustainable reasons for reaching his conclusion. The test of irrationality or perversity is an onerous one to meet and it requires the Tribunal to be satisfied that *no* reasonable Tribunal properly directing itself could have reached the finding or conclusion challenged. The fact that a Tribunal has reached what might be characterised as a generous view, for example in striking the balance between the public interest and an individual's circumstances under Article 8.2, does not in itself necessarily establish an error of law.

50. The point was made in Mukarakar v SSHD [2006] EWCA Civ 1045 and approved by the Supreme Court in R (MM) (Lebanon) and Others v SSHD [2017] UKSC 10 at [107] where Lady Hale and Lord Carnwath (in their joint judgment) said this:

> "107. It is no doubt desirable that there should be a consistent approach to issues of this kind at tribunal level, but as we have explained there are means to achieve this within the tribunal system. As was said in *Mukarkar v*

> *Secretary of State for the Home Department* [2006] EWCA Civ 1045, para 40 (per Carnwath LJ):
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> > "… It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case … The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law … Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected.""

51. As Mr Jesurum submits it has not been advanced on behalf of the Secretary of State that the decision of the judge or his findings of fact were either irrational or perverse and in light of the foregoing, the judge properly considered the appropriate factors and made findings of fact based on the evidence before him. It may well be that this was not the only outcome possible on the facts in this particular appeal but the FtTJ directed himself correctly in law and that his conclusion, even if properly characterised as one that might be thought to be a generous one, does not disclose any legal error.

52. For those reasons, I am not satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law. The decision shall stand.

Notice of Decision.

53. The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision of the FtT shall stand.

Signed *Upper Tribunal Judge Reeds*

Dated 10 June 2021.

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.