



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case Nos: UI-2022-002943  
(HU/00571/2021)

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 19 June 2023**

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Entry Clearance Officer**

Appellant

**and**

**Fozia Qayoom**  
**(no anonymity order)**

Respondent

**Representation:**

For the Appellant: Mr Tan, Senior Home Office Presenting Officer  
For the Respondent: Mr Holmes, Counsel instructed by Axis Solicitors Ltd

**Heard at Manchester Civil Justice Centre on 8 June 2023**

**DECISION AND REASONS**

1. The Respondent is a national of Pakistan born on the 3<sup>rd</sup> March 1991. She wishes to come to the United Kingdom to live with her husband her sponsor Nasir Khan. On the 4<sup>th</sup> May 2022 the First-tier Tribunal (Judge Birrell) allowed her appeal, on human rights grounds, against a decision to refuse to grant her entry clearance. The Entry Clearance Officer (ECO) now has permission to appeal against that decision.
2. The Respondent had accepted from the outset that she was unable to meet the requirements of the Immigration Rules. This was because Mr. Khan did not earn a sufficient amount to meet the 'minimum income requirement' specified in Appendix FM. She contended however that her appeal should be allowed on

Article 8 grounds 'outside of the rules'. She relied *inter alia* on the following matters:

- a. Although her husband was not in receipt of Disability Living Allowance (DLA), a benefit that would exempt him from the minimum income requirements, he was in receipt of Universal Credit, and it had been acknowledged by the relevant authority that he qualified for that benefit because he was unable to work through illness;
  - b. Her husband was unable to join her in Pakistan because he has five children in the United Kingdom with whom he has a genuine and subsisting parental relationship;
  - c. It would not be reasonable for all of the Sponsor's children, who live with their mother, to relocate with him to Pakistan;
  - d. The Respondent and her husband now have a child together, Ebrah Khan, born on the 14th of April 2020. Ebrah is a British citizen, and it would be in his best interests to grow up with both parents and for him to have a relationship with his siblings;
  - e. The effect of the decision was to create a family split that was extremely difficult for everybody concerned.
3. Judge Birrell accepted the Respondent's case that these factors cumulatively created "unjustifiably harsh" consequences for this family should the refusal be maintained. Accordingly she allowed the appeal on Article 8 grounds.
  4. The ECO now appeals against Judge Birrell's decision.

### **Consideration and Findings**

5. Mr Tan started his submissions at the end of the written grounds. The second ground of appeal is that Judge Birrell erred in failing to have regard to reported authority. In the case of SD (British citizen children - entry clearance) Sri Lanka [2020] UKUT 00043(IAC) a Presidential panel of the Upper Tribunal considered the relevance of a child's nationality in the context of an assessment of that child's best interests. The Tribunal accepted that British nationality will be a relevant factor. British citizenship includes the opportunities for children to live in the UK, receive free education, have full access to healthcare and welfare provision and participate in the life of their local community as they grow up. The Tribunal then said this:
  5. *When assessing the significance to be attached to a parent's child having British citizenship, it will also be relevant to consider whether that child possesses dual nationality and what rights and benefits attach to that other nationality.*
6. The ECO contends that Judge Birrell erred in failing to have regard to this guidance, given that the child in question, Ebrah, is both a national of the United Kingdom and Pakistan.

7. This would be a good point if it bore any relation to the decision under challenge. Judge Birrell expressly accepted at her paragraph 28 that Ebrah's British citizenship is not a determinative factor, and in her reasoning at paragraph 29 his nationality does not appear to be a factor to which any weight at all has been attached. In those circumstances her 'failure' to consider what benefits might accrue to him by being Pakistan is entirely immaterial. The child's nationality is at best a neutral factor, since wherever he lived would necessarily involve him leaving behind one of the countries that he enjoys citizenship of. It is no doubt for that reason that Judge Birrell focused entirely on the relationships in this family, rather Ebrah's right to enjoy that aspect of his private life.
8. Mr Tan then turned to the first ground, that Judge Birrell has given insufficient reasoning for her conclusions. In particular it is contended that Judge Birrell has failed to take relevant information into account including the fact that this relationship was started, and has been maintained, with one party living in Pakistan and one party living in the UK. It is submitted that she has failed to explain why it could not continue in this fashion. It is further submitted that the public interest in migrants being financially independent has not been taken into account, and that it is unclear whether there was any evidence that the Sponsor's children in the UK had any desire or intention to form a relationship with their half brother.
9. As to the first of these particulars, Mr Tan contended that this submission – that the relationship could in effect carry on as it is presently – was a point made by the HOPO on the day. He read from the record made by the HOPO after the hearing in the Home Office electronic record system. The HOPO there recorded that he had made the following submission: "the Sponsor and Appellant entered into a marriage/relationship fully aware of their situation. The Appellant is in Pakistan and the Sponsor is in the UK. They should have been aware of the need for her to meet the requirements of entry clearance". Mr Tan points out that this aspect of the ECO's case is not addressed in the decision. Mr Holmes for his part contested that this submission was made at all. He pointed out that Judge Birrell clearly addresses the ECO's case as she understood it to be put, and this point does not feature:
  25. The Respondents case would appear to be that the Sponsor could move to Pakistan to join his wife and child or that the child could take advantage of her British citizenship and join him in the UK alone....
10. I am unable to resolve this dispute about what happened at the hearing since I do not have Judge Birrell's note or access to a recording of proceedings. Ultimately, however, I do not think it matters since the point would have made no difference at all to Judge Birrell's decision, given her focus on the children in this family, and their right to have meaningful relationships with both their parents as well as each other. I agree with Mr Holmes' submission that the 'family split' option – someone living without their father – is not an option that assumes any great significance under the rules.
11. That brings me to the second particular under this heading, the issue of maintenance. It had been argued by Ms Qayoom's representative that Judge Birrell could allow this appeal on one simple point: that although he was not in receipt of DLA, the effect of correspondence about the Sponsor's Universal Credit was to the same effect. He is unable to work because he is ill, and that is enough

to answer the only ground for refusal in this case, the fact that he cannot meet the minimum income requirements. Judge Birrell did not reject that contention on the facts, but rejected the legal argument put that she could read into to the grant of Universal Credit that the Sponsor was 'in effect' in receipt of DLA. She was right to do so, because as she concluded, it had been open to the Sponsor for some time to apply for DLA and he had not done so. I record all of this in order to illustrate that it is inconceivable that the issue of maintenance, and Ms Qayoom's failure to meet the requirements of paragraph ELTR-P 3.1, was a matter of which she was unaware. As she directs herself at her paragraph 4, this was the only ground for refusal under the rules. It is quite plain from the decision that this was in the forefront of her mind. In any case, as Mr Holmes points out, the Sponsor's finances were such that the injunction at s117B(2) of Nationality, Immigration and Asylum Act 2002 would not count against Ms Qayoom. That is because, applying the notional equivalent of old income support rates, her husband's income was "adequate" to maintain her.

12. Finally there is the submission that there was "no evidence" that the Sponsor's elder children had any intention at all of having a family life with their younger half sibling if he came to the UK. Mr Tan points out that none of them mention Ebrah in their witness statements.
13. The right of these children to build relationships with each other was, I accept, central to Judge Birrell's findings. I can see from paragraphs 27 and 29 of her decision that this was a core plank of the case put on behalf of Ms Qayoom. No points made to the contrary are recorded. I assume that is because they were not made, and I further infer that this was because the HOPO proceeded on the basis that the two propositions at the heart of this submission were uncontroversial: that the right of these children to have relationships with each other was a right that fell squarely under the rubric of Article 8, and in the absence of evidence to the contrary, that they would all desire those relationships to flourish. I am not satisfied that this ground is made out.

### **Notice of Decision**

14. The decision of the First-tier Tribunal is upheld. The appeal is dismissed.
15. There is no order for anonymity.

Upper Tribunal Judge Bruce  
8<sup>th</sup> June 2023

