Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09195/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11th June 2013	**On 25th June 2013**

Before

LORD BURNS SITTING AS JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE D E TAYLOR

Between

MR IQBAL MIAH

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr A Bhuiyan instructed by Haque & Hausman Solicitors
For the Respondent: Ms M Tanner, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Brenells made following a hearing at Taylor House on 15th February 2013.

Background

2. The Appellant is a citizen of Bangladesh born on the 10th January 1982. He applied to come to the UK as a spouse but was refused entry clearance on 4th April 2012 under paragraph 281 of HC 395.

3. The Entry Clearance Officer was not satisfied that each of the parties to the marriage intended to live permanently with the other as his or her spouse or that the marriage was subsisting as required by paragraph 281(iii) of the Immigration Rules. Neither was he satisfied that there would be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they owned or occupied exclusively or that the parties would be able to maintain themselves and any dependants without recourse to public funds as required by paragraph 281(iv) and (v) of the Immigration Rules.

4. The Judge noted that, on 24th February 2011, the Appellant had appealed against an earlier decision refusing him entry clearance, and the judge in that case recorded that the Respondent had accepted that the Appellant was validly married to the Sponsor and that they intended to live together permanently and their marriage was subsisting. He said that there was no evidence before him which led him to do otherwise than follow the previous judge's conclusions. Those issues are now settled.

5. The Sponsor is unwell and has been unable to work for a number of years. She relies on State benefits and financial support from her brother, Mr M H Miah. The evidence before the judge was that she receives £20.30 child benefit per week, £54.82 child tax credit per week and £95.10 income support every two weeks making her total weekly earnings around £122.67.

6. Her rent of £84.04 was paid by the local council by way of housing benefit and she does not pay council tax. There was in fact conflicting evidence as to whether she makes any contribution to her rental costs. Amongst the papers is a Benefit Decision Notice, dated 28 September 2009, which states that she should pay £27.58 weekly but that includes the recovery of an amount of overpayments. The tenancy agreement refers to a total amount payable of £84.04 and it was the Sponsor's evidence that she makes no contribution. It may well be therefore that the overpayments are cleared. In fact the point is immaterial.

7. It is agreed between all parties that there is a shortfall of £63.01 per week in the Sponsor's income, being the difference between what she receives and is entitled to on her own account, namely £122.76, and the amount which would be payable by way of income support to a couple and one child which, at the date of decision, was £185.68.

8. The Sponsor has some savings. She has received gifts of money over some years from her brother who is single and lives with his parents with

no dependants. He has worked as a delivery driver with the Royal Mail for the last seven years and earns around £500 per week.

9. Prior to the Appellant's application he transferred £5,000 into the Sponsor's account and the evidence before the Entry Clearance Officer was that she had £7,269 in her savings account and £366 in her current account. By the date of decision she had over £10,000 in her savings account. At the date of the hearing before us she had over £12,000.

10. The Judge accepted that the Sponsor's brother had given her the money in her savings account which would enable her to cover the shortfall, and that there was no bar to her relying on that money, providing of course that it was genuinely available to her, but he said that the evidence did not establish that the brother would be willing to continue to subsidise his sister and her family "in perpetuity".

11. He wrote as follows:-

> "I have Mr M H Miah's statement and have heard his oral evidence. I also have copies of his wage slips and P60. He has however provided no evidence of his outgoings and any commitments which would have enabled me to assess whether he could afford to subsidise his sister and her family in perpetuity and particularly if the Appellant were unable to get a job.
>
> Having considered all the evidence before me and particularly in view of the length of time the subsidy is likely to have to continue, and because of the conflicting evidence given by the Sponsor and her brother, I find that the Appellant has not established that Mr M H Miah is willing and able to continue to subsidise his sister and her family for the foreseeable future."

The Grounds of Application

12. The Appellant sought permission to appeal, essentially on the grounds that the Judge had misdirected himself in requiring the Sponsor's brother to provide assistance for "the foreseeable future" and had otherwise erred in his assessment of the evidence in relation to the proposed job offer.

13. Permission to appeal was initially refused by First-tier Tribunal Judge Brunnen but subsequently granted by Upper Tribunal Judge Grubb who said:

> "In order to meet the maintenance requirement the Appellant relied upon third party support from the Sponsor's brother. At para 31, the judge accepted that the Sponsor had, as a result, savings in excess of £7,000 and her brother continued to make weekly payments to her. At para 35 however he was not satisfied on the evidence that the Sponsor's brother would be willing to subsidise the Appellant and Sponsor in perpetuity. And further at para 37 he was not satisfied that the Sponsor's brother would be willing and able to subsidise

> them for the foreseeable future. It is arguable that the judge erred in law as the Appellant would have sufficient resources available to him and the Sponsor to maintain themselves during the initial period of his visa; a finding the judge may well have made at para 31. Arguably, in those circumstances the Appellant met the requirements of para 281(v) (Begum and Others (maintenance – savings) Bangladesh [2011] UKUT 00246 (IAC) at [25].”

The Hearing

14. Although initially of the opposite view, Ms Tanner accepted that the Judge did err in law for the reasons stated in the grounds and in the grant of permission, and agreed that the Sponsor had demonstrated that she had adequate savings to meet the shortfall in her income during the initial two year visa.

Findings and Conclusions

15. In Begum the Upper Tribunal stated as follows:

> “On the face of it the Appellant fulfilled the requirements of the Immigration Rules in that they have a sufficient income and sufficient savings to make up any shortfall for the period of the initial visa. They are on notice that when they make an application for indefinite leave to remain they will have to meet the maintenance requirements of the Rules. The longer term position is not irrelevant, as Mrs Brooks Bank submitted but it is an unknown quantity. They may or may not be in a position to do so depending on a number of different factors…
>
> If the Appellants are able to meet the requirements of adequacy for the period of the initial visa and there is no reason at this stage to believe that they will not be able to meet the maintenance requirements in the longer term, then they are entitled to entry clearance.”

16. The Judge therefore erred in law in asking himself the wrong question, namely whether the third party support would be available either for the foreseeable future or in perpetuity. Instead he should have asked himself whether the Sponsor had sufficient savings available to her to cover the period of the initial visa, namely two years. If she could meet the shortfall in her income for that time, so as to fulfil the requirements of adequacy within the Immigration Rules, the appeal ought to have been allowed.

17. Mr Bhuiyan asked us to consider whether the reported decision in Begum was in error when it added the caveat

> “and there is no reason at this stage to believe that they will not be able to meet the maintenance requirements in the longer term”

18. We find no reason to revisit that decision in the context of this appeal because Ms Tanner did not argue that the Appellant should fail on that

ground. In any event, as was said in Begum it is not possible to say what a family's situation will be in two years. The Judge was not impressed with the job offer put forward by the Appellant, and it remains to be seen whether he finds work. It is possible to envisage cases in which there is clear evidence that the parties would never be able to support themselves. The Immigration Rules have looked to the parties being self sufficient in the longer term in the past, and of course they have changed since this decision was made, but since this is not at issue here we propose to say no more about it.

Decision

19. The original judge erred in law and his decision is set aside. It is remade as follows. The Appellant's appeal is allowed.

Signed Date

Upper Tribunal Judge Taylor