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

Appeal Number: IA/16054/2013
IA/16058/2013
IA/16136/2013

**THE IMMIGRATION ACTS**

| **Heard at Bradford** | **Determination Promulgated** |
|---|---|
| **On 8th April 2014** | **On 29th April 2014** |

**Before**

**UPPER TRIBUNAL JUDGE ROBERTS**

**Between**

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

Appellant

**and**

**MR KHONDOKER MEHEDI AKRAM – FIRST RESPONDENT**
**MRS AFROZA BEGUM - SECOND RESPONDENT**
**MASTER KHONDOKER FAHIM MEHEDI – THIRD RESPONDENT**
**(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Respondents: Mr G Brown, of Counsel
For the Appellant: Mrs R Pettersen, Home Office Presenting Officer

**DETERMINATION AND REASONS**

**Introduction and History**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Hemingway) following a hearing on 8th November 2013 at Bradford. For the sake of continuity I shall refer to Mr Khondoker Mehedi Akram, Mrs Afroza

Begum and Master Khondoker Fahim Mehedi as "the Appellants" as they were before the First-tier Tribunal Judge and to the Secretary of State as "the Respondent".

2. The Appellants are citizens of Bangladesh. The first Appellant Mr Khondoker Mehedi Akram (date of birth 15/12/1978) and the second Appellant Mrs Afroza Begum (date of birth 01/01/1979) are husband and wife. The third Appellant is their minor child.

3. Each Appellant appealed against the Respondent's refusal dated 25th April 2013 refusing to vary their leave to remain and making a decision to remove them pursuant to Section 47 of the Immigration Act 2006. It is recorded that the Respondent's representative at the hearing on 8th November 2013, withdrew the removal part of the decisions under Section 47.

**Background**

4. In his determination, Judge Hemingway sets out the background to these appeals.

> "The first Appellant entered the UK on 1st October 2006, lawfully, as a student. He subsequently obtained further grants of leave as a student, his last grant of leave on that basis, being until 28th February 2013. The second Appellant joined him in the UK on 20th May 2008 as a student dependant and obtained further grants of leave, in line with the first Appellant, as a dependant. As I understand it, the third Appellant came to the UK with the second Appellant and has also had corresponding grants of leave as a dependant.
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> On 26th February 2013 the first Appellant applied for further leave, under the Tier 2 provisions, in order to take up employment with the University of Sheffield as a postdoctoral research associate. Applications were made, in line, by the second and third Appellants.
>
> The Respondent refused the application of the first Appellant because he had not provided evidence of the required funds. He was required to show funds of at least £2,100 (made up of £900 for himself and £600 for each dependent) for a consecutive 90 day period ending no more than 31 days before the date of his application. He had provided, with his completed application form, bank statements issued by the HSBC Bank but, said the Respondent, the level of available funds fell below £2,100 between 3rd January and 29th January 2013 and 10th December to 12th December 2012. Thus, the requirements set out at Appendix C of the Immigration Rules were not met. The applications of the second and third Appellants were refused in line.
>
> The Appellants have appealed and their appeals form the matters now to be determined".

**The Judge's Findings**

5. In what is a clear comprehensive and fairly balanced determination, the Judge considered the essential elements of the Appellants' appeals. He concluded that the Appellants could not rely upon the evidential flexibility policy in Rodriguez. He looked at Section 55 of the Borders Act with reference to the third Appellant and

concluded that as the Appellants would be removed as a family unit, that did not avail them.

6. He also directed himself that the Appellants could not rely on any sort of "near miss" argument albeit that the Judge found as a fact that at the date of application the Appellant did have the necessary funds available to them – the evidence they have provided with the application simply did not show this and that is why they failed to satisfy the relevant Immigration Rule.

7. Having correctly identified all those factors and weighed them in the balance on the proportionality assessment, the Judge said at paragraphs 49 and 50 of his determination,

> "I do, though, accept that, with respect to the first Appellant, his research is of real importance to him. He spoke enthusiastically and in a way which demonstrated his commitment to it at the hearing. The written evidence of Dr Bingle, which was not challenged before me, does indicate that the first Appellant is involved in an important research project and that it will be difficult to replace him. Dr Bingle commented in his letter;
>
> "In summary, Dr Akram has already established himself as a highly valuable member of my research group and his loss would have significant detrimental effects on the important work that we undertake at the University of Sheffield."
>
> I do conclude that this represents an unusually significant aspect of the first Appellant's private life, which goes beyond the sorts of links that students for example might make through a course of study, and that his research, its nature and his involvement in the specific research project being pursued at Sheffield University and which is linked to one at Liverpool University is a matter of unusual and considerable substance".

8. He then went on to further conclude in paragraph 60,

> "It is the strength of his connection with the project and his commitment to it which has formed, on a private life basis, the most significant argument in favour of the three Appellants. If applications are made beyond 2016 then no doubt decisions will be reached one way or the other depending upon the facts as they then are. I would not wish to look ahead and forecast what the situation might be in or after 2016. It may be prudent, though, for the two adult Appellants to contemplate at least the possibility of a return to Bangladesh in the longer term".

**The Upper Tribunal Hearing**

9. Mrs Pettersen on behalf of the Respondent submitted that the Judge misdirected himself in allowing the appeal on Article 8 grounds when the Appellants could not meet the Immigration Rules; a case under Article 8 should only be allowed where it can be shown that the circumstances are exceptional in some way. Exceptional is defined as circumstances in which although the requirements of the Rules have not been met, refusal would result in an unjustifiably harsh outcome.

10. It was accepted by Ms Pettersen that the Judge allowed the appeal on a very narrow basis – namely the first Appellant's research project.

11. Mr Brown on behalf of the Appellants referred to his Rule 24 response dated December 2013. Essentially, he submitted, the Judge was correct in his assessment, had given sufficient reasons for his conclusions on the Article 8 assessment and therefore there was no misdirection or error of law disclosed. The decision should stand.

**Has the Erred?**

12. I am satisfied that the decision of Judge Hemingway discloses no error of law. The determination demonstrates that the Judge applied his mind to whether removal of the first Appellant (and therefore of the second and third Appellants whose cases are dependent upon him) would constitute an unjustifiable interference with his private life.

13. There is no suggestion that the Judge has based his assessment on an inaccurate factual matrix. On the contrary the Judge has carefully set out at paragraphs 35 to 59 of his determination his reasons why he forms the conclusions he did.

14. He took into account *CDS (Brazil)* [2010]. The grounds seeking permission do state "It is unclear what weight should be applied to research projects in the context of an article 8 assessment, but it is submitted that that such undertakings would be akin to employment. It was found in *CDS (Brazil)* that there is "no human right to work" and it is submitted that this should extend to the first Appellant's research project". There was nothing put before me to show why the first Appellant's research project should be treated as akin to employment.

15. The correct approach and the one adopted by the Judge is not to view this case in stark terms of someone being here simply to work. The Judge had evidence from Dr Bingle (the Appellant's Director of Research) that there would be a substantial detriment to the research project being undertaken if the first Appellant could not continue in the UK as part of that research team. Public money has already been expended on this research project. That money may well end up being wasted should the first Appellant not be permitted to continue as part of the research team. That evidence is unchallenged and clearly formed part of the Judge's reasoning when he carried out the proportionality assessment.

16. That led the Judge to conclude, that to refuse the first Appellant's Article 8 claim would on the facts as he found above result in an unjustifiably harsh outcome. In other words the facts of this case met the exceptionality test as outlined by Mrs Pettersen. That assessment was open to the Judge for the reasons he gave.

17. For the foregoing reasons I find there is no error in the determination of Judge Hemingway.

**DECISION**

18. The decision of Judge Hemingway stands. The Respondent's appeal is dismissed.

No anonymity direction is made

**Signature** **Dated**
Judge of the Upper Tribunal

I have dismissed the appeal and therefore there can be no fee award.

**Signature** **Dated**