Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/14364/2013
OA/14372/2013
OA/14373/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26th August 2014	**On 17th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

SHEBI BEGUM
AMINA BEGUM
ARIFA BEGUM

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R M Ahmed, instructed by Lincoln's Chambers Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Bangladesh born on 27th May 1971, 4th March 1995 and 18th May 2000, and they applied for entry clearance as the partner and children of their sponsor, Mr Mohammed Rashid, on 27th February 2013. Those applications were refused by the Entry Clearance Officer on 13th June 2013 on the basis that the

sponsor's income was contrived for the purposes of the application and that the English language documents were not accepted as genuine.

2. The appeal was determined by First-tier Tribunal Judge A J M Baldwin and he refused the appeal. He took into account the documentation placed before him which included the respondent's bundle including the applications, employment contract, payslips, bank statements and accommodation evidence, and the appellants' bundle which included a skeleton argument, statements, bank statements, employer's letter and contract, payslips, P60 and tax coding.

3. He also took into account evidence from HMRC.

4. An application for permission to appeal was submitted to the Upper Tribunal stating that the sponsor clearly earned the required funds. The Immigration Rules required that the sponsor earned £24,800 per annum and it was submitted that he earned in excess of this in the six months prior to the application which was lodged on 27th February 2013. It was submitted that the sponsor's gross income in the relevant year was £24,960 per annum.

5. It was asserted in the grounds of application for permission to appeal that the judge was concerned at the increase in the sponsor's salary and had doubted that the appellant had gone on holiday in Europe. The important question was whether the sponsor's salary or increased salary was supported by the proper documentary evidence and this had been proved by the income and concrete documentary evidence such as confirmation from the Inland Revenue, P60, payslips and employment letter. The judge had failed to give due weight to these documents, which was a material error of law. It was not mandatory for the sponsor to come and give evidence for the hearing.

6. The employer clearly wrote a letter clarifying and confirming the sponsor's employment and presented a P60, payslips and Inland Revenue letters.

7. Further issue was taken with the language certificate. The British High Commission suspended all the circumstances issued by the City & Guilds for a temporary period and all applicants who had passed from City & Guilds were victims. As a result, following the British High Commission's advice, the principal appellant did re-sit the test and passed and was issued with certificates. It was wrong for the Entry Clearance Officer to assess the applicant's level of English through telephone.

8. The judge had not taken this into account and it was an error of law.

9. Further the judge made a speculative finding in paragraph 20 in stating that:

> "*The fact that the ECO was not sent a copy of the new certificate I find it unsafe to conclude that the second certificate is probably genuine, though it may subsequently be found to be.*"

10. If the judge had any doubt he could have remitted the matter/certificate to the Entry Clearance Officer. The case of **DR (ECO: post-decision evidence) Morocco* [2005] UKIAT 00038** clearly sets out the law and principles in relation to postdecision evidence and that there was a contrast between "circumstances appertaining" at the date of decision and "a matter arising" after that date. The judge was wrong not to take this into account.

11. Further it was wrong to state that Article 8 was not developed before him. The skeleton argument submitted in the appellants' bundle mentioned various points of Article 8 and supporting case laws and the judge did not make proper findings on Article 8. Further the judge did not apply the five questions in **Razgar [2004] UKHL 27**.

12. The judge should have considered **Beoku-Betts [2008] UKHL** and the family unit as a whole.

13. Permission to appeal was granted by Judge White who stated that it was arguable that the judge gave inadequate reasoning for finding that the appellants failed to meet the financial requirements given that the judge stated that the documentary evidence "appears to corroborate" the sponsor's claimed income.

14. Secondly it was arguable that in the judge finding that the appellants had not proved that the first English language certificate was genuine at paragraph 20 showed the judge had failed to apply the correct burden of proof, see for example **RP [2006] UKAIT 00086**.

15. Thirdly it was arguable that in regard to the second English language certificate the judge had failed to take into account the re-sit process referred to in the respondent's undated letter to the applicant and the Entry Clearance Manager review of 29th April 2014.

16. It was argued that the judge's reasoning with regard to Article 8 was inadequate and did not address the points raised in the skeleton argument contained in the appellants' bundle.

17. At the hearing Mr Ahmed relied on the written grounds for permission to appeal and submitted that there was a contradictory finding in the decision between paragraphs 8 and 19 with regards to what evidence was accepted. The sponsor had shown income for the relevant tax year and confirmed in oral evidence that he had recommenced employment on 1st September 2012. I was referred to pages 47 and 48 of the bundle with respect to the HMRC documentation submitted before the judge.

18. With regard to the language course the appellant had now passed the English language test. She had made arrangements for a proper assessment and a chance to re-sit which the appellant did and she passed. A new certificate was available from 22nd March 2013. This evidence should be submitted as per **DR (Morocco)**.

19. Mr Avery submitted that there was nothing wrong with the judge's findings. He had taken into account the evidence and the judge was entitled to find that he was surprised that the employer was not called.

20. **DR (Morocco)** did not apply to the language tests which were taken *after* the decision to sit and the appellant could not rely on what was being said. There was no policy with regards to a process in these particular circumstances. The judge had stated that the Article 8 argument had not been developed.

21. Mr Ahmed responded and stated that Article 8 had been raised in the hearing and in the skeleton argument submitted at the First-tier Tribunal.

Conclusions

22. There are specific requirements under the Immigration Rules for the appellant and sponsor to satisfy and in this case because there was an appellant and two children requesting entry to the UK and the annual figure of income which was required was that of £24,800. The Entry Clearance Officer had clearly set out in the reasons for refusal letter that the appellant had submitted six payslips, corresponding bank statements for the same period and a P60 for 2011 to 2012 showing he earned an annual income of £11,297. It was stated that the sponsor was paid in cash each month and that as of September 2012 his earnings had increased to £20,400 per year. Previously he had earned £400 per week gross and from 1st September this increased to £480 gross per week.

23. The Entry Clearance Officer states that there was no evidence in relation to the previous wage received prior to September and no reason why it would be increased so significantly. The Entry Clearance Officer stated that he noted that the position held by the sponsor was already head chef and thus the Entry Clearance Officer was not satisfied that the income had increased as the sponsor had stated.

24. Further the Entry Clearance Officer stated that the documents submitted did not reliably demonstrate that she had passed the English language test as required under the Immigration Rules.

25. The judge clearly set out the evidence he considered under paragraph 8 which stated:

> "*In relation to the sponsor's income, payslips, an employment contract and bank statements were provided with the applications. They appear to corroborate the claim that the sponsor's gross income was £24,960 per annum.*"

26. The judge also recorded that the first payment of £2,080 gross (£1,625.44 net) was stated to be earned from September 2012.

27. The judge then recorded that the appellant had earned a sum of £11,297.45 from the same employer the previous year. The judge also set out the letter from the employer dated 28th August 2012 confirming that his salary increase would be from 1st September 2012 at a rate of £480.

28. The judge also noted that the contract with effect from 1st October 2011, that is the previous year, recorded the sponsor as being the head chef and showed his salary as £20,800.

29. The judge at paragraph 8 did not accept the evidence but stated that the evidence merely *appeared* to corroborate the appellants' case. The judge did not set out that the evidence of the employer was mandatory of the Immigration Rules but merely stated quite correctly that bearing in mind that the sponsor had known for over ten months that there was a challenge to the income that the oral evidence of the employer might have been helpful.

30. However, the judge at paragraph 10 of his determination noted that revenue records recorded the sponsor as starting his present employment on 1st August 2012 and earning £16,640 in the tax year 2012 to 2013. The P60 recorded a gross pay of £24,960 in the tax year 2013 to 2014.

31. The judge clearly shows in paragraph 11 that he had asked the sponsor why he had only earned a total of £16,640 in 2012/13 if he worked for the same employer in the same job and found that the appellant changed his evidence and did not give adequate responses. At first stated that he had gone abroad but could not produce the passport to show the stamps and then stated that he had not returned from Bangladesh until 13th July 2011 and that he had started work again with the same employer in September 2012. He then stated that he did not work for the employer between April and July but started again on 1st August 2012. He was asked how it was that his salary in August 2012, that is before it was said to have increased, was the same as it was on 1st September 2012, and he stated that he had worked extra hours and he had left his job for several months because they would not increase his salary and he instead travelled around Europe. The sponsor, I note, did not state that he was paid in arrears but that he did extra hours. In addition the judge found that overtime did not feature in a single of the pay slips provided for subsequent months. Thus even if the sponsor was paid in arrears and I stress, this was not the evidence given, the judge still did not accept that his salary would have gone up so significantly when he was in the same role as head chef working for the same employer. The judge found at [11] that 'he had worked in the same capacity since 1st October 2011 and clearly did not accept the evidence from the employer letter and P60 and payslip in the face of the HMRC documentation.

32. Although the evidence of the sponsor was recorded the judge clearly did not accept it and his findings are set out at paragraph 19. The judge reviewed the evidence comprehensively and set out the challenges to the evidence that the appellant had produced. The judge took into account the fact that the sponsor in the oral hearing was "less than clear in his answers" and that he become more and more unclear [19]. The judge recorded the fact that the appellant claimed he had gone on holiday in Europe in the summer of 2012 but was unable to produce stamps in either passport for 2012 [11].

33. The judge also doubted the sponsor's evidence because the hearing was the first time he had ever made mention of leaving India Limited in favour of touring Europe for several months and not working with them in March to July inclusive [19].

34. The judge did not accept this on the basis that he found it highly improbable that with a wife and three children in Bangladesh he would choose to tour Europe rather than continue working in the UK or spending time in Bangladesh.

35. Also the judge found that his claim that his pay in August 2012 was the same as it was in September when his salary was supposed to have gone up by 20% was "highly unlikely" as it was not evidenced by a payslip or a bank statement for August 2012.

36. The judge did not accept the sponsor's explanation that there was overtime. The judge was aware that the income claimed for 2011 to 2012 was in fact £16,640. This is evidence produced by the HMRC and is the most reliable evidence and the evidence from the HMRC was that the appellant only earned that lower amount in the relevant tax year 2012 to 2013 and in the period relevant for the appeal. The sponsor's claim that this increased in the following year just did not withstand the judge's scrutiny not least because of the shifting oral evidence of the appellant's sponsor.

37. In sum the judge found that the appellant had failed to clarify the maintenance issue raised by the Entry Clearance Officer and rather "cast a shadow over the issue".

38. It was open to the judge to find that the evidence was unreliable and he clearly did so.

39. I find no error of law in respect to the judge's treatment of evidence regarding maintenance.

40. The Entry Clearance Officer submitted a letter from City & Guilds dated 20th May 2013 and this was available at the First-tier Tribunal hearing to the effect that all certificates relating to an examination conducted in Bangladesh with an issue date prior to 1st October 2012 would not be accepted as evidence of a pass in English language proficiency for visa applications. I can accept that the burden of proof is initially on the respondent to show that the document is a forgery but in fact the City & Guilds letter shows that there *were* irregularities in the conduct of English language examinations in Bangladesh. Thus the burden may shift to the appellant and thus I do not accept that the judge used the wrong burden or standard of proof in respect of the language certificate as he stated: "In the light of the interview record answers and the other information provided by the ECO I find that the appellants have not proved that it is probably genuine." As the judge stated, she provided had another certificate which related to a date ten months after the decision. The judge recorded that the Entry Clearance Officer was not sent a copy of the new certificate. What is clear is that the appellant had taken the second examination prior to the Entry Clearance Manager review but no certificate had even been submitted prior to the Entry Clearance Manager review ten months later.

41. I was asked to consider **DR (Morocco)** in this respect but taking a language test ten months later does not demonstrate circumstances appertaining at the time, and that indeed I find is a matter arising after that date. The appellant had not attempted to submit a further certificate prior to the Entry Clearance Manager's review which was ten months after the decision.

42. The fact is that the appellants could not comply with the Immigration Rules with respect to maintenance and the judge's findings in this respect contained no material error of law and any further issue under the language certificate could not make a difference.

43. The judge was clear in relation to Article 8 that it was raised in the grounds of appeal and he did make findings not least that there are in fact three children of this couple and one of them aged 16 who would be left behind in Bangladesh whilst her mother and two siblings moved to the UK. He stated: "One cannot look at the best interests of two of the sponsor's children in isolation from their sister."

44. Further **Shahzad (Art 8: legitimate aim)** [2014] UKUT 00085 (IAC)

Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

45. The judge considered the Immigration Rules and found that there was "no good arguable case has been made out under Article 8 outside the Rules".

46. The judge was entitled to make this finding and although his reasons may be brief further to **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)** I find that they are adequate bearing in mind the judge has had regard to the evidence. In essence the judge found that the appellants could not comply with the maintenance requirements. **R(MM (Lebanon)) v SSHD** [2014] EWCA Civ 985 is proposition that the maintenance requirements under the Immigration Rules are necessary and lawful and not incapable of being applied in a manner which is proportionate or justifiable and that within Appendix FM of the Immigration Rules the best interests of the child have been considered.

47. On an overall reading of this determination there is no error of law and it shall stand.

Signed Date 16th September 2014

Deputy Upper Tribunal Judge Rimington