Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/23440/2012
OA/12823/2012
OA/12871/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 July 2014	**On 08th Aug 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) MR MUHIT KHAN
(2) MISS MAHFUZA MITU KHANOM
(3) MASTER MINHAZ PAVEL KHAN
(NO ANONYMITY ORDER)

Appellants

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:

For the Appellants: Mr M Chowdhury, KC Solicitors
For the Respondent: Mr N Bramble, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal dismissing their appeals against the refusal of entry clearance for the

purposes of settlement. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The appellants are all nationals of Bangladesh. The first appellant was born on 14 November 1959, and is the father of the second and third appellants. The second appellant was born on 24 March 1994, and the third appellant was born on 26 April 1995.

The Refusal of Entry Clearance to the Children

3. The second and third appellants applied for entry clearance to join their mother in the United Kingdom in March 2012, and their application was refused on 3 May 2012.

4. Following this refusal, the first appellant applied for entry clearance with a view to settlement as a spouse. The sponsor of his application was the mother of the second and third appellants. The application was made just before Appendix FM came into force, and therefore it was governed by the old Rules.

The Subsequent Refusal of Entry Clearance to the Husband/Father (and another child)

5. On 18 October 2012 the application was refused on the sole ground that the Entry Clearance Officer in Dhaka was not satisfied the first appellant could, and would be, accommodated adequately without recourse to public funds in accommodation which his sponsor owned or occupied exclusively, citing subparagraph (iv) of paragraph 281 of the Immigration Rules.

6. Apparently, although this is not referred to in the refusal decision, there was a simultaneous application for entry clearance by the couple's youngest child, Fahim Khan, who had been born in Bangladesh in July 1998. This application for entry clearance was refused, and (as I was informed at the hearing) it was decided not to pursue an appeal against this refusal.

The Hearing before, and the Decision of, the First-tier Tribunal

7. The appeals of the three appellants came before Judge Lobo sitting at Taylor House in the First-tier Tribunal on 20 March 2014. Mr Chowdhury appeared on behalf of the appellants, and Ms Wilsdon, a Home Office Presenting Officer, appeared on behalf of the respondent.

8. The appeal hearing proceeded on the basis that there was a common question of fact affecting all three appeals, namely adequacy of maintenance and accommodation. It was common ground that the appeals of the children were governed by paragraph 297. In refusing entry clearance to the children, the Entry Clearance Officer had contended that they did not qualify for entry clearance under paragraph 297(i)(a)-(f). In particular, he was not satisfied that their mother in the UK had had sole responsibility for their upbringing. In addition, they had not demonstrated there

were serious and compelling family or other considerations that made their exclusion from the UK undesirable. His reasoning was that the children, their siblings and their father had resided in Bangladesh since their respective births. Their mother had chosen to leave Bangladesh to settle in the UK of her own choosing (on 1 July 2010), leaving all of them behind in Bangladesh. Therefore, any break-up of the family unit was a direct consequence of a personal choice made by their mother. While she had lived overseas since 1 July 2010, their father had remained in Bangladesh, and they continued to live with him. They stated in their applications that they were supported jointly by their parents.

The determination of Judge Miller in respect of an earlier settlement application

9. On the issue of maintenance and accommodation, the Presenting Officer relied on a previous determination by Judge Miller following a hearing at Taylor House on 13 September 2011. This was a determination in respect of a previous appeal against the refusal of entry clearance for settlement brought by the entire family. This comprised Mr Khan and the couple's four children: as well as the children previously mentioned, there is Miss Mahbuba Khanom, who is the second youngest child. The application of the family had been refused under paragraph 281 and 301 of the Rules on the ground that the maintenance and accommodation requirements were not shown to be met. The Entry Clearance Officer was not satisfied that the sponsor had provided accurate information about her true financial circumstances and income.

10. At the hearing before Judge Miller, the sponsor and her brother, Jamir Hussain, gave oral evidence and were cross-examined.

11. In his subsequent determination, Judge Miller gave detailed reasons for finding that the maintenance and accommodation requirements were not satisfied. At paragraph 40, he held that on the question of whether the appellants would be able to maintain themselves adequately, although he accepted the sponsor had produced a P60 showing she was employed by Fashion Spice, her brother's business, he was not satisfied that such employment would continue beyond such time as entry clearance was granted to the appellants. With regard to accommodation, the proposal was that the appellants would reside with the sponsor at 72 St Margarets Road, a property which was owned by her brother but in respect of which he was paying mortgage payments of £369 per month. The judge was not satisfied that if the appellants went to live at this property, there would not be a real risk of the property being repossessed. The core finding which underlay the judge's reasoning was that, based upon an analysis of the financial documentation provided, the sponsor's brother appeared to be finding it very difficult to make ends meet with the running of his business (paragraph 40).

12. The judge concluded at paragraph 41 as follows:

> I regret to say that I have found that although the bundle of documentation before me is extensive, as I have highlighted above, I find much of the evidence unreliable, and I do not consider the evidence presented by the sponsor and her brother to have been honest. I am afraid, therefore, that despite the evidence of Mr Alam, I do not accept

> there is a bona fide offer of a job to the first appellant, and for all the reasons I have stated above, these appeals must inevitably fail.

Judge Lobo's reliance on the determination of Judge Miller

13. In his subsequent determination, Judge Lobo annexed as appendix A paragraphs 33 to 42 of Judge Miller's determination. He discussed the import of Judge Miller's determination at paragraphs 25 to 29 of his own determination. He directed himself that the first Immigration Judge's determination should always be the starting point, but that facts happening since the first determination could always be taken into account by the second judge.

14. At paragraph 30 he observed that in the current appeal the appellants were relying on the same sponsor, who was herself relying upon the same brother for employment and for providing accommodation. There was a difference in that the sponsor claimed that she was paying her brother rent, whereas previously she had lived at another property of his rent-free. The sponsor also claimed that she was employed by the brother who was her employer in the previous appeal.

15. Judge Lobo held at paragraph 31 that the evidence presented by the sponsor and her brother in the previous appeal was found to be unreliable and dishonest, and the factual matrix of the appeal before him was more or less identical, save that the sponsor had moved next door to another house owned by her brother. There had been no evidence in the appeal before him to answer the very serious points made in the previous determination regarding the business and accountancy practices of the brother and the honesty of the evidence. There had been no explanation as to why the evidence in the appeal before him, from the same witnesses who had given evidence previously, should be regarded as credible in view of the conclusions of Judge Miller.

16. Furthermore, as the judge held at paragraph 33, that there had been no evidence to show that the sponsor had had sole responsibility for the upbringing of the second and third appellants, nor was there any evidence to show that there were serious and compelling family or other considerations that made exclusion of the second and third appellants undesirable.

17. The judge went on to dismiss the appeals on all grounds raised.

The Grant of Permission to Appeal to the Upper Tribunal

18. On 22 May 2014 Judge Osborne sitting as a Judge of the First-tier Tribunal granted the appellants permission to appeal to the Upper Tribunal for the following reasons:

> I find that the First-tier Tribunal Judge failed to recognise that the sponsor's financial and domestic circumstances had changed significantly since the 2011 determination – she was now living in a different property and had produced updated documentary evidence which, in my judgment, has been inadequately considered by the First-tier Tribunal Judge.

The Rule 24 Response

19. On 4 July 2014 John Parkinson of the Specialist Appeals Team settled a Rule 24 response on behalf of the Entry Clearance Officer opposing the appeal. The appellants were still reliant on the claimed income of the sponsor derived from her brother. Under those circumstances, it was open to the judge to conclude that material concerns raised in the first determination were not addressed. The sponsor was still dependent on her brother for accommodation as well. Given the serious doubts on income, the matter of the sponsor's claimed savings was not a material issue.

The Hearing in the Upper Tribunal

20. At the hearing before me, I reviewed the documentary evidence that had been before the First-tier Tribunal relating to the sponsor's financial circumstances at the date of both refusal decisions in 2012. The sponsor's bank statement showed a steady increase in her credit balance over the period of February 2012 to October 2012. The balance in her account as of 27 February 2012 was £3,045, and by 27 October 2012 the balance had risen to £9,269.71. My attention was also drawn to two P60s for the tax year ended 5 April 2013 in the appellants bundle before the First-tier Tribunal. The P60 issued by Fashion Spice Ltd purportedly showed that she had achieved gross earnings from her employment with them of £17,186. The P60 issued by People Resources showed gross earnings of £6,000.

21. Mr Bramble submitted there was no error of law in the judge failing to take into account the savings of the appellant, as the judge had given adequate reasons for finding that the sponsor did not have a reliable source of income, relying as she did on employment by her brother. Even if it was assumed that the savings in the account were genuinely available to the sponsor to spend on maintaining her husband, they would be exhausted in less than a year.

Discussion

22. As I ruled at the hearing, there is no error of law in the judge's finding that the second and third appellants do not qualify for entry clearance under paragraph 291(e) or (f). The judge had to consider the circumstances appertaining at the date of the decision to refuse the second and third appellants entry clearance. Their father had not applied simultaneously for entry clearance, and so the only possible basis on which they could qualify for entry clearance to the United Kingdom was that their mother in the United Kingdom had sole responsibility for their upbringing; or that there were serious and compelling family and other considerations which made exclusion of the second and third appellants undesirable (in circumstances where the parent who was looking after them in Bangladesh was remaining in Bangladesh).

23. Mr Chowdhury sought to rely on the evidence of the appellant in her witness statement before the First-tier Tribunal that her husband was unable to make a settlement application at the same time as the second and third appellants "due to the lack of relevant English language requirements". But this does not change the

fact that the second and third appellants simply did not qualify for entry clearance at the date of the refusal decision which is under appeal. The fact that the children's appeal was joined to their father's appeal does not mean that the relevant date of assessment is shifted from the date when the children's entry clearance application was refused to the date when the father's entry clearance application was refused.

24. Accordingly, the appeals of the children could not succeed, and they were rightly dismissed by Judge Lobo. Since they could not succeed under subparagraph (i) of paragraph 297, any error in the judge's approach to the question of maintenance and accommodation under paragraph 297 is not material.

25. I turn to consider whether the decision of the First-tier Tribunal discloses an error of law in respect of the dismissal of the appeal of the first appellant. Mr Bramble mounted a robust defence of the judge's findings on maintenance and accommodation, but ultimately I am persuaded that the decision discloses an error of law, albeit not as canvassed before me in oral argument. I find that there was inadvertent procedural unfairness in the judge not drawing a clear distinction between the grounds of refusal directed to the father, as against those directed to the children. As against the first appellant, the Entry Clearance Officer had not in fact raised a concern about the sponsor's ability to maintain him in the United Kingdom. The sole issue raised was over whether there would be adequate accommodation for the first appellant without recourse to public funds. Moreover, the findings of Judge Miller with regard to the sponsor's ability to maintain and accommodate *the entire family* do not necessarily hold good for the significantly reduced burden of only having to maintain and accommodate the first appellant, particularly having regard to the amount of savings that the sponsor had accrued by the date when the first appellant was refused entry clearance. As previously noted, the amount of her savings was considerably greater in October 2012 than it was in May 2012. By the judge taking a compendious approach to the refusals, the first appellant was deprived of the benefit of a differential analysis which might have led to a different conclusion in respect of his appeal.

The Remaking of the Decision

26. Mr Bramble submitted that, if I found an error of law on the question of maintenance and accommodation, it would be necessary for there to be a rehearing on this issue, as its resolution turns on the credibility of the sponsor and her brother.

27. However, I do not consider that it would be in accordance with the overriding objective for there to be a further hearing on this question, given the length of time which has elapsed since the date of the refusal decision. I can fairly and more conveniently remake the decision on the narrow basis that the only issue raised by the Entry Clearance Officer against the first appellant in October 2012 was adequacy of accommodation.

28. Having regard to the totality of the evidence that was before the First-tier Tribunal, I am prepared to accept that at the time of the refusal decision in October 2012 the

sponsor was able to accommodate the first appellant adequately in accommodation which she occupied exclusively without recourse to public funds.

29. I have the benefit of hindsight whereas Judge Miller was relying on foresight. Despite the misgivings about the brother's financial situation expressed by Judge Miller in 2011, the sponsor was still being accommodated without recourse to public funds by her brother over a year later. To that extent it does not matter that there is no documentary evidence of the sponsor paying rent to her brother. Further, as pointed out in the grounds of appeal, the ECO did not dispute the sponsor's ability to maintain the first appellant. The property inspection report relied on in support of the application shows that the first appellant could be accommodated at the 74 St Margarets Road address without overcrowding.

30. But while I find that the first appellant has discharged the burden of proving that he meets the requirement of paragraph 281 of the Immigration Rules that was put in issue by the Entry Clearance Officer, I do not consider it is appropriate to direct that he should be granted entry clearance in consequence, having regard to the passage of time, the discretion which rests with the Entry Clearance Officer to be satisfied that there has been no material change of circumstances since October 2012 and the need to have regard to the interests of the children under the age of 18 who are being looked after by the first appellant in Bangladesh.

Decision

The decision of the First-tier Tribunal dismissing the appeals of the second and third appellants did not contain an error of law, and the decision stands. The decision of the First-tier Tribunal dismissing the appeal of the first appellant contains an error of law, and accordingly the following decision is substituted: the first appellant's appeal against the refusal decision of October 2012 is allowed under the Rules, but I decline to direct that the first appellant be granted entry clearance in consequence.

Signed Date

Deputy Upper Tribunal Judge Monson