Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/02644/2014
& OA/02648/2014

THE IMMIGRATION ACTS

Heard at : IAC Birmingham	**Decision & Reasons Promulgated**
On : 20 July 2015	**On 24 July 2015**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

CHANDRA MALA
PARVEJ MIAH

Appellants

and

ENTRY CLEARANCE OFFICER, DHAKA

Respondent

Representation:
For the Appellant: Mr Z Jafferji, instructed by Eurasia Legal Services
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants, mother and son, are citizens of Bangladesh, born on 12 April 1960 and 24 November 1996. They applied for entry clearance to the United Kingdom on 13 October 2013 to settle as the spouse and child of the sponsor, Azam Ali, who had indefinite leave to remain in the United Kingdom.

2. The appellants' applications were initially refused by the respondent on 12 January 2014. The respondent noted that the sponsor had been granted indefinite leave to remain

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in the United Kingdom on the basis of 14 years' residency and considered that the fact that he had purposely evaded the authorities for that period in order to qualify under the long term residency concession demonstrated his willingness to disregard the immigration rules. The respondent noted that the first appellant and the sponsor were married in 1977. The sponsor had subsequently gone to the United Kingdom and there was no evidence that he saw the appellants during the 14 years in which he was living in the United Kingdom prior to regularising his stay. The appellants last saw the sponsor in February 2013 and their applications were submitted eight months thereafter. In the circumstances, and given the absence of evidence of regular and ongoing contact, the respondent did not accept that the first appellant's relationship with the sponsor was genuine and subsisting or that they intended to live together permanently in the United Kingdom. The first appellant's application was therefore refused under paragraph EC-P.1.1(d) of Appendix FM of the immigration rules, with reference to paragraphs E-ECP.2.6 & 2.10.

3. The respondent considered further that the appellants did not meet the income threshold requirement and the related evidential requirements under Appendix FM, paragraph E-ECP.3.1 and Appendix FM-SE as the documents produced in relation to the sponsor's employment and income were not accepted as reliable, since the amount on the payslips did not correspond with the deposits shown in the sponsor's bank statements and the payslips each showed identical amounts of net pay. The respondent did not accept that the sponsor was in receipt of the income claimed from his two claimed jobs. The respondent noted that in order to meet the financial requirements of the rules, the sponsor's gross income had to be at least £22,400 per annum but the evidence of his income was not accepted.

4. The second appellant's application was refused in line with first appellant's application, under Appendix FM, paragraph EC-C.1.1(d) and E-ECC.1.6.

5. The respondent, however, did not make a final decision since the Secretary of State's appeal against the decision in MM, R (On the Application Of) v The Secretary of State for the Home Department [2013] EWHC 1900 was awaited in relation to the maintenance requirements of the rules.

6. On 13 October 2014 the respondent then made a final decision in the appellants' applications, repeating the refusal reasons given previously.

7. The appellants appealed against the decisions and the appeals were heard on 13 November 2014 in the First-tier Tribunal by Judge Ghani. The judge heard from the sponsor and noted his evidence that he obtained indefinite leave to remain in March 2012 and was unable to visit his wife and children in Bangladesh until January 2013. He married his wife in 1977 and came to the United Kingdom in March 1993. They had five children. He visited his family again in July 2014 and had kept in regular contact with him. The sponsor claimed to have two jobs, with Balti Hut, owned by Mrs Rongmala Begum, and West Bromwich Bangladeshi Welfare Association and Islamic Centre. He claimed that he had sufficient income to meet the requirements of the immigration rules and had produced payslips, bank statements and an employment history letter from the HMRC showing that he earned £22,888 in the financial year 2013/14. He was paid cash in hand

and did not deposit all the earnings into his bank account, but his employers paid the due tax and declared his income to the HMRC.

8. Judge Ghani accepted that the first appellant and the sponsor were in a genuine and subsisting relationship. However he did not accept that the financial requirements of the rules were met. He noted that the amount deposited into the sponsor's bank account was far less than what he claimed to earn and he found the letter from HMRC to be unclear as to the period of pay. He considered that there remained doubts as to the amount earned by the sponsor and he found that the requirements of the immigration rules could not be met. He concluded further that the decision did not breach the appellants' Article 8 rights.

9. Permission to appeal to the Upper Tribunal was sought on the grounds that the judge had failed to carry out a proper assessment of the sponsor's total income and had erred by rejecting the letter from HMRC which confirmed the income as claimed. It was asserted that the requirements of Appendix FM were met and furthermore that the judge had erred in his assessment of Article 8.

10. Permission was granted by Upper Tribunal Judge Martin on 16 February 2015 on the grounds that the judge had arguably misunderstood the document from the HMRC which showed that the sponsor had earned £22,888 in the tax year 2013-14.

Appeal hearing and submissions

11. The appeals came before me on 20 July 2015. I heard submissions on the error of law.

12. Mr Smart submitted that the appeals could not have succeeded as there was no evidence in the form of bank statements corroborating the salary shown in the payslips. The judge made adequate findings on Article 8.

13. Mr Jafferji submitted that the judge had made an error in the consideration of the HMRC letter and had also erred by considering the rules which were not in force at the time of the respondent's decision. The judge had erred by failing to explain how much of the sponsor's income correlated to the deposits shown in the bank statements and that was relevant to Article 8. The sponsor earned sufficient income to meet the rules and even if the evidential requirements were not met, that was relevant to the Article 8 assessment.

14. On the basis of Mr Jafferji's submission that the judge had considered the immigration rules in force subsequent to the respondent's decision, and when taken together with the fact that the judge had plainly misunderstood the HMRC letter, I found that his decision contained errors of law requiring it to be set aside. I then heard submissions with a view to re-making the decision.

15. Mr Jafferji submitted that the sponsor's net earnings were £9652 and that the amount paid into his bank account was £8760, making the shortfall only marginal. On the basis that without the strict requirements of Appendix FM-SE the sponsor would have met the threshold, and considering the fact that the second appellant would not be able to make a fresh application as he would be over 18, Mr Jafferji submitted that there were exceptional circumstances such that the appeals ought to succeed under Article 8.

16. Mr Smart submitted that it was not accepted that the sponsor earned what he claimed to earn and the HMRC letter was no more than proof of what had been declared as earnings. There were no compelling circumstances justifying a grant of leave outside the rules.

17. Mr Jafferji responded by reiterating his previous submissions.

Consideration and findings

18. Having heard Mr Jafferji's submission, that the judge had applied the immigration rules which were not in force at the time of the respondent's decisions (namely Appendix FM-SE1(n)), I considered that his decision was materially flawed and had to be set aside. However having now considered the documents further it seems to me that that submission was incorrect when considering that the relevant decisions were made on 13 October 2014, rather than 12 January 2014, the date of the initial decisions. Paragraph FM-SE1(n) was inserted on 6 April 2014 and was therefore in force at the time of the decisions of 13 October 2014.

19. However, it remains the case that the judge erred in his understanding of the letter from HMRC of 4 September 2014. Contrary to his understanding, that letter gave the figures for the declared income for the sponsor for one year, namely for the tax year 2013-14. The start and end dates referred to in the table in that letter referred not to the period of earnings but to the dates of employment with the various employers. Whether or not that error in itself would justify the setting aside of the judge's decision is questionable, and probably would not do so, given that the appellants could not in any event meet the requirements of the rules, the ultimate conclusion I reach in re-making the decision is nevertheless the same.

20. It is clear that the appellants could not meet the evidential requirements of the rules in Appendix FM-SE with respect to the relevant income threshold requirement of £22,400 per annum. Appendix FM-SE 2. requires that all of the specified evidence must be provided in respect of salaried employment, namely (a) payslips, (b) a letter from the employers who issued the payslips and (c) personal bank statements corresponding to the same periods as the payslips showing the salary paid into the account. The letters produced by the appellants from the sponsor's employers were produced after the respondent's decision and there was no such specified evidence produced to the respondent when the decision was made. Furthermore the amounts on the pay slips do not correspond with the deposits into the sponsor's bank account. I find no merit in Mr Jafferji's submission that the total amount paid into the sponsor's account over the relevant period is not significantly different from the amount of salary in the payslips, since there is no way of knowing the source of the deposits and there is no consistency between the dates of the deposits and the dates of the salary payments.

21. Neither do I find that the HMRC letter materially assists the appellants since, as Mr Smart submitted, it is no more than a confirmation of the income declared by or on behalf of the sponsor and is thus limited in its evidential weight. Such letters do not form part of the required evidence within Appendix FM-SE, no doubt for that very reason. Mr Jafferji asked me to find that if the sponsor had wanted to create an income for the purposes of

the applications he would not have produced evidence of two different jobs and been able to produce evidence from professional accountants for the businesses. However I find little merit in that submission, given the lengths that the sponsor was clearly prepared to go to in order to secure permanent residence in the United Kingdom, namely spending over 14 years apart from his family and evading the United Kingdom authorities for that period. It is also of some note that the same accountants appear to act for both employers. Accordingly I find that the evidence does not establish that the sponsor's income is as claimed and I conclude that the appellants have not been able to meet the requirements of the immigration rules.

22. As regards Article 8 of the ECHR, I do not accept Mr Jafferji's submission that there are compelling circumstances justifying a grant of leave outside the immigration rules. I do not accept that the appellants' inability to meet the income requirements of the immigration rules is due simply to a technicality as a result of the evidential requirements. For the reasons given above it has not been established that the sponsor meets the income threshold in any event. As regards the family ties, the lengthy period of time in which they have lived apart is plainly material and weakens the strength of those ties. Whilst it may be the case that the respondent has legitimised the sponsor's status by granting him indefinite leave to remain, the fact remains that he was prepared to spend 14 years living unlawfully in the United Kingdom, apart from his family, in order to obtain permanent residence here. Even after obtaining his grant of indefinite leave he did not visit his family until almost a year later and has visited them only twice for short periods of time. The appellants' applications to join him in the United Kingdom were made a year and a half after he was granted indefinite leave to remain. Although it is accepted that family life has been established for the purposes of Article 8, the appellants and sponsor have chosen to conduct their family life by living in different countries for a significant period of time and it is clear that the family ties are therefore limited. Mr Jafferji asked me to take account of the fact that the second appellant would not be able to make a fresh application as he is now over 18 years of age. However that was as a result of choices made by the family and does not, in my view, make the family's circumstances compelling. For all of these reasons, and having had regard to the public interest considerations in section 117 of the Nationality, Immigration and Asylum Act 2002, I do not find that the respondent's decision is disproportionate or in breach of Article 8.

23. I would accordingly dismiss the appeals on all grounds.

DECISION

24. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. In re-making the decision I dismiss the appellants' appeals on all grounds.

Signed Date

Upper Tribunal Judge Kebede