



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/03595/2015  
HU/03604/2015  
HU/03611/2015  
HU/04901/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 31 August 2018

Decision & Reasons Promulgated  
On 6 September 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

NEETU [C]

[HC<sup>1</sup>]

[HC<sup>2</sup>]

[TC]

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

**Representation:**

For the Appellant: Mr A Malik, Counsel, instructed by Londonium Solicitors

For the Respondents: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. These are remade appeals against the respondent's decisions, dated 8 July 2015, to refuse the appellants entry clearance to join [AC] (hereafter sponsor) in the UK.

In an 'error of law' decision promulgated on 9 July 2018 I found that Judge of the First-tier Tribunal O'Brien (the judge), who dismissed the appeals in a decision promulgated on 24 April 2017, failed to lawfully consider the best interests of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants who are all minors. Both parties agreed that an adjournment was required in the interests of justice to enable further evidence to be provided in respect of the children's best interests. To ensure there was no uncertainty as to the scope of the adjourned hearing, I indicated that the judge's assessment of the relationship between the sponsor and the appellants would be preserved, as would the judge's factual findings relating to the financial requirements of Appendix FM and Appendix FM-SE and the 1<sup>st</sup> appellant's failure to meet the English language requirements of Appendix FM.

## **Factual background**

2. The appellants are all nationals of India. The 1<sup>st</sup> appellant, whose date of birth is 7 November 1984, is the mother of the remaining appellants, whose dates of birth are 6 August 2003, 5 October 2007 and 6 March 2009. The 1<sup>st</sup> appellant is the wife of the sponsor and the remaining appellants are the children of the sponsor. The sponsor is a national of India. Although the name recorded in his India passport is simply '[A]', his full name has always been [AC]. His name in his British passport is '[AA]'. He lawfully entered the UK in November 2002 and has always had lawful leave to remain. He naturalised as a British citizen on 8 March 2011.
3. The appellants applied for entry clearance to join their husband/father. They applied under Appendix FM and Appendix FM-SE of the immigration rules. The respondent was not satisfied the relationship between the 1<sup>st</sup> appellant and the sponsor was genuine and subsisting, or that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants were the sponsor's children. Nor was the respondent satisfied that the financial requirements contained in Appendix FM and Appendix FM-SE were met, or that the 1<sup>st</sup> appellant met the English language requirements. The respondent's decisions were upheld by an Entry Clearance Manager following a review on 3 November 2015.
4. The First-tier Tribunal judge found that the sponsor was the husband of the 1<sup>st</sup> appellant and the father of the remaining appellants, and that he had genuine and subsisting relationships with the appellants. The judge found however that the financial evidence did not meet the requirements of Appendix FM and Appendix FM-SE as of the date of the applications. The evidence before the judge at the date of the First-tier Tribunal hearing suggested that the sponsor had an annual salary of £24,000, below the £27,200 required under Appendix FM. Nor was the judge satisfied with the explanation advanced on behalf of the 1<sup>st</sup> appellant to explain the absence of her required English language certificate.
5. The judge went on to consider whether the decisions under appeal constituted a disproportionate interference with the rights stemming from Art 8 ECHR. The

judge directed himself in respect of the relevant public interest factors noting in particular that the requirements of the immigration rules for entry clearance had not been met. The judge found that the appellants would not be financially independent were they to be admitted into the UK, and that the 1<sup>st</sup> appellant's inability to meet the English language requirements fortified the public interest. The judge noted that the family's family life has been established predominantly if not entirely whilst living in separate countries and that they appeared able to maintain that life through regular visits by the sponsor and regular contact via modern means of communication. The judge consequently found that the decisions were proportionate. However, in so doing, the judge failed to identify or assess the best interests of the 2<sup>nd</sup>, 3<sup>rd</sup> or 4<sup>th</sup> appellants. In my 'error of law' decision I found that the proportionality assessment could not, on any rational view, be lawfully carried out without such an assessment.

### **Evidence before the Tribunal and the parties' submissions**

6. The Tribunal file contained the respondent's bundle of documents and the Appellants' Bundle prepared for the First-tier Tribunal hearing. I received the day before the hearing a Supplementary Bundle containing, *inter alia*, an affidavit from the 1<sup>st</sup> appellant dated 10 August 2018, a letter from the school attended by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellant, dated 21 August 2018, and a letter from the Local Council Jodhpur India, dated 30 August 2018.
7. At the outset of the hearing Mr Malik indicated that the sponsor would not be in attendance. I inquired whether there was any reason for the sponsor's non-attendance. No reason was proffered. No application was made to adjourn the hearing. I was invited by Mr Malik to proceed with the hearing on the basis of submissions only.
8. I asked Mr Malik to identify all the documents upon which he sought to rely. In addition to the documents contained in the Supplementary Bundle, he invited me to consider the following documents in the original Appellants' Bundle: the 1<sup>st</sup> appellant's witness statement, the sponsor's witness statement, a letter from the children's school (this was however so poorly photocopied as to be entirely illegible), the sponsor's mobile phone bills, evidence of money transfer receipts, the sponsor's travel tickets, and photos showing various family members on different occasions.
9. Mr Malik indicated that, since 2002, the sponsor has travelled to India on 4 occasions. My attention was drawn to the 1<sup>st</sup> appellant's statement where she stated that the sponsor had lived in the UK for almost 14 years and had a settled life in the UK, and that she and the sponsor wanted to give their children a better future and wanted to live together in the UK to enjoy their life. My attention was drawn to the sponsor's statement where he said that it was "completely impossible" to go to India and resume "any type of life there." I was additionally

invited to consider the 1<sup>st</sup> appellant's affidavit where she stated that her children were being affected socially because their father was working abroad, that they were deprived of his love, fondness and affection, and that the children's education was also being affected. The Local Council letter asserted that the sponsor's absence was having a negative effect on the family and that the 1<sup>st</sup> appellant's involvement in community activities had decreased, that people were concerned about the 1<sup>st</sup> appellant, and recommended that the appellants be reunited with the sponsor.

10. Mr Malik submitted that it was in the children's best interests that they join their father in the UK and that the refusal of entry clearance was disproportionate under Art 8 having regard to the sponsor's length of residence (over 15 years), his earnings of over £24,000, and his British nationality.

### **The Burden and Standard of Proof**

11. It is for the appellants to discharge the burden of proof and the standard of proof to be applied is a balance of probabilities. As these are appeals against the refusal of human rights claims I can consider any matter which I think is relevant to the substance of the decisions, including matters arising after the date of the decisions (s.85 of the Nationality, Immigration and Asylum Act 2002).

### **Decision**

12. There is no longer any dispute that the appellants cannot meet the requirements of the immigration rules for a grant of entry clearance. The entry clearance applications were not accompanied by the specified documents needed to evidence the sponsor's income, as required by Appendix FM-SE. At the date of the First-tier Tribunal hearing the sponsor earned around £24,000, less than the annual income of £27,200 as required by Appendix FM. There was no further evidence at the adjourned hearing in respect of the sponsor's income, and there was no new statement from the sponsor. As the sponsor did not attend the hearing there was no opportunity to ascertain his present financial circumstances. Nor did the 1<sup>st</sup> appellant meet the English Language requirements of Appendix FM. The First-tier Tribunal judge gave cogent and sustainable reasons for rejecting the explanation advanced on her behalf. Mr Malik did not seek to persuade me that the requirements of the immigration rules could be met.
13. The appeal must therefore be considered outside the immigration rules on Art 8 grounds. The judge accepted that the sponsor had genuine and subsisting relationships with his wife and his children, and that the refusals of entry clearance constituted a sufficiently serious interference with the family's private and family life to trigger the operation of Art 8. Having regard to the sponsor's telephone bills and Western Union customer receipts, the evidence of the sponsor's travel and the various photographs, I am satisfied that the sponsor has a genuine and subsisting relationship with his wife and a genuine parental

relationship with his children. These relationships have however been maintained at a distance and the sponsor has only visited India on 4 occasions since he entered the UK. As was pointed out by the Court of Appeal in **SM & Ors (Somalia) v Entry Clearance Officer (Addis Ababa)** [2015] EWCA Civ 223, the the trauma of breaking up a family and thereby rupturing family ties may be significantly greater than the effect of not facilitating the reunion of a family whose members have become accustomed to living apart following a decision by part of the family to live elsewhere. It has not been suggested that the respondent's decisions are anything other than in accordance with the law, or otherwise not in pursuit of a legitimate aim. The dispute between the parties rested on the assessment of proportionality.

14. I have considered the public interest factors identified in s.117B of the Nationality, Immigration and Asylum Act 2002. I note that the maintenance of effective immigration controls is in the public interest. It is relevant that none of the appellants fulfil the entry clearance requirements of the immigration rules. In **Agyarko** [2017] UKSC 11, at [47], the Supreme Court held that, in considering how the balance is struck in individual cases, courts must take the Secretary of State's policy, reflected in the immigration rules, into account, and attach considerable weight to it as a general level. With respect to s.117B(2), the 1<sup>st</sup> appellant has not demonstrated that she can speak English. With respect of s.117B(3), there was no adequate evidence that the 1<sup>st</sup> appellant was financially independent, or that the sponsor's income was at the level lawfully set in Appendix FM. The factors in s.117B(4), (5) and (6) do not apply to the appellants as they are seeking entry to the UK.
15. I must also take into consideration, as a primary, though not a paramount consideration, the best interests of the children. The 'best interests' assessment of the children is to be undertaken with exclusive reference to the children and without regard to public interest factors. They children were born in India and have lived there all their lives with their mother. The 1<sup>st</sup> appellant's affidavit contend that the children's lives are being adversely affected socially, but no explanation or example is given. The affidavit also states that the children's education is being affected as they are emotionally disturbed by the absence of their father. There is no independent and reliable evidence to indicate that the children have any mental or physical health issues, and no medical evidence was placed before me. The letter from the children's school indicate that the children are of good character, that they regularly come to school, and that the 1<sup>st</sup> appellant regularly attends parent-teacher meetings. It does not suggest the children's education is being undermined by the absence of their father. The Local Council letter contends that the separation from the sponsor is having a negative effect on the family because the 1<sup>st</sup> appellant's involvement with community activities has decreased but no more detailed explanation is provided and the assertion is insufficiently particularised. I am nevertheless satisfied that it is in the best interests of the children to live with both their parents. I do not however find that

this requires the children to be admitted to the UK. They have lived in India all their lives and are currently being educated in school. They are undoubtedly familiar with India and the culture and customs of the country. I find that it would be in the best interests of the children for the sponsor to relocate to India and live there with his wife and children.

16. In my judgment the appellants have not come anywhere close to identifying any particular difficulties that the sponsor may encounter in relocating back to India to live with his wife and children. I take into account the fact that the sponsor has lawfully resided in the UK for over 15 years and that he has been a British citizen since 2011. In **Agyarko** (at [68]) the Supreme Court held that the entitlements conferred on British citizens by section 1(1) of the Immigration Act 1971 did not entitle a British citizen to insist that his or her non-national partner should also be entitled to live in the UK, when that partner may lawfully be refused leave to enter or remain. I note that he has always been employed and has, as a consequence, contributed to the economy. I accept that he is either renting property or has a mortgaged property. I accept that, having lived in the UK for over 15 years, he has developed a private life. There is however no further evidence of the nature or extent of that private life. There is no reliable evidence of any other relationships he may have formed in the UK, or his involvement with the community, and there is no reliable evidence that he has any other friends or family in the UK. It has not been suggested that he suffers from any particular vulnerability or that he is not in a fit state of health. Nor has it been suggested that he would be unable to find employment in India. He was born in India in 1972 and appears, on the evidence before me, to have resided there until he came to the UK in 2002. He therefore lived some 30 years in India. He would undoubtedly be familiar with the languages (a Hindi interpreter was requested for the hearing), the culture and the way of life, despite having not lived there for over 15 years (I note that he has visited on 4 separate occasions).
17. The sponsor's assertion in his statement that it would be "completely impossible" to go to India is wholly unparticularised and the sponsor's lack of attendance at the hearing meant that this bold assertion could not be investigated. While it may initially prove difficult for the sponsor to give up his employment and his familiarity with the UK and return to India, the appellants have failed to provide evidence tending to show that he would face any significant difficulties in continuing his life with his family in India.

18. In my judgment there is insufficient evidence that the refusals of entry clearance would result in unjustifiably harsh consequences such that refusal would not be proportionate. I therefore dismiss the appeals on human rights grounds.

**Decision**

**The appeals are dismissed on human rights grounds**



31 August 2018

Signed

Date

Upper Tribunal Judge Blum