Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/24478/2018
HU/24480/2018

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 2nd September 2019	**On 12th September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MUSAMMAT [B]
(2) [R J]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr N Ahmed (Counsel)
For the Respondent: Ms H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge D S Borsada, promulgated on 15th May 2019, following a hearing at Birmingham on 1st May 2019. In the determination, the judge dismissed the appeal of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are both nationals of Bangladesh. The first Appellant was born on 28th December 1981. The second Appellant was born on 13th December 2006. The first Appellant is the mother of the second Appellant, who is 13 years of age.

The Appellants' Claim

3. The background to the Appellants' appeal is that she entered the UK on a spouse's visa on 20th June 2015 with valid leave until 27th February 2018. On 15th February 2018 the Appellants submitted an application for further leave to remain which was refused. The Appellant's son entered the UK at the same time as her mother, the first Appellant and also made a similar application. The basis of the refusal is that, although it was accepted that the Appellant was in a relationship with a UK national and that the suitability and eligibility requirements of the Immigration Rules were met, the financial requirements were not met. This is because the sponsoring husband of the first Appellant was not working. He was a British citizen. Furthermore, the Appellant had a stepdaughter, who was aged 21 years, and was the daughter of her husband from a previous marriage, and she was a student in full-time education, such that she was also settled here as a British citizen and was unlikely to want to return to Bangladesh, if the Appellant and her son, the second Appellant, were to be removed back to Bangladesh.

The Reason for Refusal

4. In the refusal letter, the Respondent made it clear that the second Appellant was not a qualifying child under Section 117B(6). No reason was given why the Appellant, her son, and her Sponsor/husband could not live with her mother in Bangladesh which is where she had previously resided.

The Judge's Findings

5. The judge was clear that the Appellant was in a genuine and subsisting relationship with her husband, the UK based British citizen. The judge also accepted that the Appellant and her son had come to the UK for the purpose of settlement. He observed that "therefore would have had an expectation of remaining here permanently" (paragraph 7). Nevertheless, their failure, in circumstances where their status was still "precarious", to remain in the UK was on account of their failure to meet the Immigration Rules, which made it clear that they had to satisfy the "financial requirements" of the Rules. If it had been argued before the judge that there had been the tragedy of the murder of the Appellant's son in the UK, leading to a period of grievance on the part of the family. However, the sponsoring husband of the first Appellant had not been working even before then. Whilst it was accepted that the first Appellant's husband had diabetes and high cholesterol, this was not a reason for his not working. Moreover, the judge was of the view that "it is difficult to understand why no family members came to the hearing and no evidence of third party support (financial) was produced" (paragraph 7).

6. The judge concluded that there were no exceptional circumstances to the Appellant's claim. It was open to them to enjoy family life, in circumstances where they had failed to meet the Immigration Rules, in Bangladesh, should they wish to do so. There was no disproportionality involved in this regard. The appeal fell to be dismissed both under the Immigration Rules and under Article 8 of the ECHR.

7. The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the judge failed to undertake a proportionality assessment, assessing the public interest under Article 8(2) and applying the provisions of Section 117B, separately from his consideration of the Appellant's position under the Immigration Rules.

9. On 17th June 2019 permission to appeal was granted.

10. On 5th July 2019 the Respondent submitted a detailed and comprehensive Rule 24 response, pointing out that the grounds are merely a disagreement with the negative outcome of the appeal. The Appellant's Sponsor had a British daughter, and she was an adult aged 21 years, and she could live independently in the UK if she so chose. The younger child (the second Appellant) had lived in the UK for a very short period of time and was not a qualifying child. The conclusion with respect to proportionality was one that the judge was entitled to reach.

Submissions

11. At the hearing before me on 2nd September 2019, Mr Ahmed, appearing on behalf of the Appellant, had a skeleton argument, based upon the grounds of application. He then raised a number of protracted and confusing submissions. He submitted that there was a 21 year old daughter, the stepchild of the first Appellant, with whom the family relationship was in evidence. The judge had come to the wrong conclusions under the Rules when assessing "insurmountable obstacles" (EX.1), but even if he was wrong about this, the position had to be looked at outside the Immigration Rules, and the judge had failed to do so. Had he done so, the balance of considerations may well have fallen in favour of the Appellants, so that the judge would not have decided that family life had to be continued in Bangladesh, if at all.

12. For her part, Ms Aboni relied upon the detailed Rule 24 response. She submitted that all relevant factors were considered by the judge. The Appellants simply could not satisfy the financial requirements. No reasons had been advanced for why the Sponsor had not been working. The compassionate circumstances have not been overlooked. The death of the young son had been properly acknowledged by the judge. The medical condition of the sponsoring husband was noted. All of this was done in relation to the consideration of the Appellant's claim under the Immigration Rules. It was not necessary for the judge to do the same when looking at Article 8.

Error of Law

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law. My reasons are as follows.

14. Although Mr Ahmed himself was unable to draw my attention to this despite my asking him to explain to me why the Appellant's sponsoring husband could not relocate to Bangladesh and continue with the enjoyment of his family life in that country, the evidence was in existence before the Tribunal, such that it ought to have been factored into an Article 8 evaluation by the judge. Thus, it was clear from the Respondent's refusal decision that the Appellant's sponsoring husband had maintained that he "was a British citizen, has friends and family in the UK, has worked here and may not wish to uproot to relocate to Bangladesh and it may be very difficult for the couple to do so …" (see paragraph 4(i)) of the determination.

15. Although it was not Mr Ahmed who had represented the Appellants below, their representative before Judge Borsada had argued that "the Appellant and her son had come here with the expectation of permanent settlement and the evidence they had given for why returning to Bangladesh was not possible was both plausible and credible. Given that the Sponsor/husband had been here in the UK for more than 40 years and therefore had developed a social and cultural life in this country, it will be unreasonable for him to give up this settled life and the benefits of being a UK citizen" (see paragraph 4(iii)).

16. Accordingly, the fact that there was evidence to the effect that the Sponsor who had lived in the UK for 40 years was not in a position to leave this country to relocate to Bangladesh or something that should have been considered in the context of freestanding Article 8 jurisprudence, because it would mean that family life could not be continued in Bangladesh.

17. This was an important consideration given that this was already a case where the family life was being enjoyed between the named family families this country already. It was not a case of the family life being resurrected in another country.

18. The question was whether the existence of a present family life could be continued in another country. If the Sponsor had set his face against going to Bangladesh then such a family life will be ruptured. The question then was whether in the light of Section 117B considerations of the public interest, the decision to refuse the Appellant's could be justified.

19. Had the judge considered the position under Article 8, then what he had observed at paragraph 8, namely, that "a separation was given that he had held that, "I did accept that the couple were physically and emotionally close and therefore I agree with the proposition that a separation was not something that should be contemplated …" (paragraph 8). The complete sentence went on to say that "however if they both went to live in Bangladesh they would not be separated" (paragraph 8). The Appellant's sponsoring husband was a British citizen who had

lived in this country for 40 years and had not indicated any intention to go to Bangladesh and to live there.

20. In those circumstances, separation would have become a reality. The judge had to consider this in the context of Article 8. He had to do so because the judge also allowed for the possibility that, "I do accept that for the Sponsor/husband the adjustment to life in Bangladesh would be difficult …" (paragraph 8). It is well-established that he could not be compelled, as a British citizen, to go to Bangladesh.

21. The question was whether he would do so himself in order to preserve his family life. He had given no such indication. All the evidence was to the contrary. In the same way, the Appellant's stepdaughter, was already living in this country as a 21 year old in full-time education, but she lived as part of the family household under the same roof, and enjoyed a pre-existing family life with her stepbrother, the second Appellant, as well as her stepmother. Her position too, needed to be considered under freestanding Article 8 jurisprudence. In the circumstances, given the failure to do so, the decision of the judge below amounted to an error of law and stands to be set aside.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the First-tier Tribunal (see Section 12(1) of TCEA 2017). I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Borsada, pursuant to Practice Statement 7.2(b) of the Practice Directions.

No anonymity direction is made.

The appeals are allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 10th September 2019