IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-004911
UI-2022-004912, UI-2022-004913
UI-2022-004914, UI-2022-004915
First-tier Tribunal Nos:
HU/00128/2021
HU/00130/2021,
HU/00132/2021
HU/00138/2021,
HU/00140/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 March 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

Mrs Saleya Khanom (First Appellant)
Miss Maisha Begum (Second Appellant)
Miss Rumana Begum (Third Appellant)
Miss Naima Begum (Fourth Appellant)
Mr Foysol Ahmed (Fifth Appellant)
(NO ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Presenting Officer
For the Respondent: Ms J Norman, Counsel, instructed by Syed Shaheen & Partners

Heard at Field House on 6 February 2023

DECISION AND REASONS

Introduction

1. For ease of reference I shall refer to the parties as they were before the First-tier Tribunal: thus the Entry Clearance Officer is once more "the Respondent" and Mrs Khanom and her children are "the Appellants".

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Abebrese ("the judge"), promulgated on 3 December 2021 following a hearing which took place on 5 October 2021. By that decision, the judge allowed the Appellants' appeals on the basis of Article 8 ECHR ("Article 8").

3. The Appellants are all citizens of Bangladesh. The first Appellant is the mother of the remaining four. They applied for entry clearance to join the first Appellant's husband and remaining Appellants' father ("the Sponsor") in the United Kingdom.

4. The applications were refused by the Respondent for three reasons: first that the Sponsor's earnings were not sufficient for the purposes of the financial requirements under Appendix FM to the Immigration Rules ("the Rules"); second, that there was no satisfactory accommodation for the Appellants; and third, that the first Appellant had failed to show that she satisfied the relevant English language requirement.

The judge's decision

5. Having set out the reasons for refusal, the judge considered the evidence before him, comprising in the main documentary and oral evidence from the Sponsor. The judge found the evidence as a whole to be credible and consequently found as a fact that the Sponsor's total earnings were in excess of the relevant threshold required under Appendix FM, namely £29,600. The judge recognised that on a strict application of the Rules, specifically Appendix FM-SE, the evidential requirements could not be met by virtue of the way in which the Sponsor was, at least in part, renumerated for his work.

6. The judge was satisfied that there was suitable accommodation in place.

7. The judge was concerned that the Respondent had apparently failed to take account of the consequences of the COVID-19 pandemic on workers such as the Sponsor. The judge found that the circumstances - as he found them to be - were such that there would have been unjustifiably harsh consequences for the Appellants and on this basis he allowed the appeal.

The grounds of appeal

8. The Respondent put forward three essential points in her grounds of appeal. First, it was said that the judge had allowed the appeal "with minimal explanation" and that this was because the issue before him had been "binary" in nature: either the Sponsor had met the financial requirements under Appendix FM (and Appendix FM-SE) or he had not. Second, it was said that the Sponsor had failed to provide any "corroborative evidence" to show that the Sponsor's earnings were as claimed, and the judge had failed to take account of this, with a similar error pertaining to the issue of accommodation. Third, it was said that the judge had failed to deal with the issue of whether the Appellant could meet the English language requirements. This rendered the judge's decision "incomplete".

9. Permission was granted on all grounds.

10. Subsequent to the grant of permission, the Appellant's provided a rule 24 response.

The hearing

11. Mr Melvin relied on the grounds of appeal. There was no application to amend those grounds, whether in advance of, or at, the hearing.

12. Mr Melvin submitted that the judge had failed to take account of the inability of the Sponsor/first Appellant to satisfy the financial requirements under Appendix FM and Appendix FM-SE and had failed to take account of the absence of a valid English language test certificate. He submitted that the judge's decision should be set aside and the decision in the appeal re-made on the evidence now before the Upper Tribunal.

13. Ms Norman relied on the rule 24 response. She submitted that the points raised orally by Mr Melvin simply did not reflect the grounds of appeal. Those grounds had not challenged the judge's finding that there existed unjustifiably harsh consequences. That was effectively fatal to the Respondent's challenge. This was because the judge had rightly recognised that the financial requirements could not be met and had been entitled to go on and consider the case under GEN.3.2 and/or entirely outside of the Rules. The overall conclusion reached had been open to the judge had not been challenged in the grounds. Insofar as the grounds had raised issues, they were without merit. The judge was entitled to find on the evidence before him that the Sponsor's earnings were as claimed, their accommodation was in place. As to the language issue, once the judge had reached the conclusion on unjustifiably harsh consequences, the English language requirement fell away.

14. In reply, Mr Melvin suggested that the errors he had articulated in oral submissions were "obvious" and that I should consider them. Ms Norman

countered that by emphasising the absence of any application to amend the grounds.

15. At the end of the hearing I reserved my decision.

Conclusions

16. I remind myself of the need for appropriate judicial restraint before interfering with a decision of the First-tier Tribunal, particularly where the judge has seen and heard evidence on relevant issues, has engaged in a fact-finding exercise, and has undertaken an evaluative assessment before arriving at the ultimate conclusion.

17. I also remind myself of the importance of procedural rigour, not simply in the context of judicial review, but in respect of appeals brought by any party against decisions of the First-tier Tribunal. In particular, it is important for grounds of appeal to be properly drafted and to identify the specific errors of law said to have been committed by the judge below.

18. Turning to the present case, I agree with Ms Norman that the grounds of appeal simply do not challenge the judge's conclusion that there were unjustifiably harsh consequences for the Appellants. There has been no application to amend those grounds. Mr Melvin's suggestion that the point was "obvious" is misconceived. Firstly, because the so-called "Robinson obvious" issue does not go to benefit the Respondent save in limited circumstances (which do not apply here: see, for example, AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245) IAC) and, secondly, it is simply far too late in the day for any amendment to be made (expressly or by implication) during the course of a party's submissions at a hearing. For the avoidance of any doubt, if any application to amend had been made at such a late stage, I would have refused it.

19. The failure of the grounds to challenge the conclusion on unjustifiably harsh consequences is, in my judgment, effectively fatal to the Respondent's appeal against the judge's decision. This is because that conclusion was, in light of the evidence and the judge's consideration thereof, properly open to him. Even if there had been a challenge to that ultimate conclusion, the Respondent's challenge would not have succeeded. In either scenario, my primary reasons are as follows.

20. In respect of the first ground of appeal, the issue before the judge was not simply a "binary" one. He was tasked with considering whether the Appellants could indeed meet the requirements of the Rules in the first instance, but, if they could not, to then go on and consider whether there were exceptional circumstances which would entail unjustifiably harsh consequences. That could be considered, strictly speaking, within the Rules in terms of GEN.3.2, or entirely without: it makes little difference which approach one takes. The judge did reach a conclusion on unjustifiably harsh consequences and the first ground fails to identify any error.

21. In respect of the second ground of appeal, there was no requirement for the Sponsor to have provided corroborative evidence of his earnings. The judge was, on the evidence he was provided with, entitled to have found as a fact that the earnings were as claimed and that they met the relevant threshold. The judge recognised that the lack of specified evidence meant that the strict requirements of Appendix FM-SE could not be met, but that was not fatal to the exceptional circumstances/unjustifiably harsh consequences issue which, by definition, only came into play if the Rules could not be satisfied. The same applies to the issue of accommodation.

22. It was open to the judge to find that all of the evidence was credible. The judge was entitled to take these findings into account, together with the issue relating to the COVID-19 pandemic, when reaching his conclusion as to unjustifiably harsh consequences.

23. I agree with Ms Norman's point in respect of the third ground of appeal. The inability to satisfy the Rules would by necessary implication have included that relating to the English language requirement. Yet the judge had already been looking beyond an ability to satisfy all of the substantive requirements of those Rules because of the issue under Appendix FM-SE. Thus, in my judgment the English language issue was not material to the exercise with which he was concerned.

24. Overall, whilst the judge's decision could be described as generous, the key conclusion he reached has not been challenged and, in any event, the aspects of his decision which have been do not disclose material errors of law.

Notice of decision

25. It follows from the above that the Respondent's appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal stands.

26. Although the First-tier Tribunal made an anonymity direction, one is not required at this stage of proceedings. The fact that some of the Appellants are minor children is not of itself sufficient to justify a direction. The principle of open justice is a weighty consideration.

H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 2 March 2023