IAC-FH-KH-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Jahangara Begum and others (maintenance – savings) Bangladesh [2011] UKUT 00246 (IAC)

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 18 April 2011	**14 June 2011**

Before

SENIOR IMMIGRATION JUDGE TAYLOR

Between

JAHANGARA BEGUM
MASTER MIZANPUR RAHMAN
MISS JEBA BEGUM
MISS REBA BEGUM
MISS RUMANA BEGUM
MASTER HAFIZUR RAHMAN

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Emma Brooksbank of Henry Hyams & Co.
For the Respondent: Mr D Hunt-Jackson, Home Office Presenting Officer

Where the likely income of a family falls below the level of adequacy as established in the case of KA and others (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065 the shortfall can be met where there are sufficient savings. The assessment of the appropriate level of savings is not an arbitrary calculation and the proper reference is to the length of the initial visa. If an appellant is able to meet the requirements of adequacy for the period of the initial visa, and there is no reason to believe that he will not be able to meet the maintenance requirements in the longer term, then he is entitled to entry clearance.

DETERMINATION AND REASONS

1. This is the Appellants' appeal against the decision of Immigration Judge Baker made following a hearing at Bradford on 2 December 2010.

Background

2. The first Appellant is the wife of the Sponsor Mr M N Islam and mother of the second, third, fourth and fifth Appellants who are all citizens of Bangladesh born between 1995 and 2006. They applied to come to the UK as the spouse and children of the Sponsor under paragraphs 281 and 301 of HC 395 but were refused on maintenance grounds on 3 May 2010. The Sponsor is working but his earnings are not adequate to meet the requirements of the Immigration Rules.

3. The Immigration Judge wrote as follows:

> "I find that the material facts relevant to this appeal are as follows. One can only have admiration for the Sponsor in the way he has diligently and regularly built up his savings in the hope that such would then permit his family's reunification in due time knowing that his stable but insufficient level of income would not permit a conventional application to succeed. However on the occasion of the last appeal made after such a refusal IJ Mailer made it clear in paragraph 23 of his judgment of 17 November 2008 that savings used up over time will leave the family no capital to rely on which would be unacceptable. Further in paragraph 24 it was pointed out that firm employment arrangements would have to be shown to be in place before such a prospective source of income for the first Appellant could realistically be taken into consideration. Surprisingly this appears to have been ignored in the presentation of the renewed application under this appeal. The numbers of prospective peoples and arrangements therefore are at best vague and undocumented and at the least entirely speculative. The Sponsor is relying on his employer who lives 25 miles away to organise it all for his wife. Not a very reliable arrangement perhaps. The first Appellant's list of prospective students with the intended terms of employment set out and signed by the respective parents would have been far more persuasive I suspect.
>
> As far as the patiently accumulated savings are concerned, after the most anxious scrutiny I cannot accept Mr Hassan's argument re their adequacy at the date of decision relative to the likely period of leave being sought.

> There is absolutely no guarantee that the second Appellant would indeed be able to contribute to the family income as and when suggested. With the best will in the world finances for the family would be extremely tight and the savings buffer would always be required to avoid the need of recourse to public funds. As such with some regret I find that the Appellant's have just failed to discharge the required standard of proof of their case as is required. Perhaps with a more cogent proof of future earnings and a higher build up of savings in the future a successful application may be submitted. For this appeal however the Appellants must fail."

4. The Immigration Judge dismissed the appeal under the Rules and stated that he had examined the arguments put forward in support of the submission that Article 8 was engaged. He said that sadly mere sympathy is not sufficient to engage the Convention.

The Grounds of Application

5. The Appellant sought permission to appeal on the grounds that the Immigration Judge's treatment of the Sponsor's savings was irrational. The Sponsor had available savings of about £20,000.

6. The figures used for calculation of maintenance by Immigration Judge Baker were that the Sponsor's income came to £256.34 per week as against a total requirement of £381.50 per week which is the level of income support that the family would be entitled to. There was therefore a shortfall of £125.16 per week. £20,000 divided by £125.16 comes to 159. There would be 159 weeks during which the maintenance shortfall could be made good by the savings, which is a period longer than the period for which leave may be granted by the Immigration Rules under paragraphs 281 and 301, a maximum of 27 months. 27 months equates to approximately 117 weeks. The savings accumulated by the Sponsor are therefore adequate to account for the maintenance shortfall for the maximum period of leave (117 weeks) with a £5,356.28 surplus. It must be irrational to reach a figure of available funds for the period of leave applied for which is adequate according to relevant case law and yet to dismiss the appeal.

7. The case of KA and Others (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065 establishes that it is appropriate to consider savings in the calculation. It has also been established in Mahad (Ethiopia) v ECO [2009] UKSC 16 that third party support is available to applicants to satisfy the maintenance requirements of the Rules. An applicant may be supported from the savings of a third party to make up for an income shortfall of a Sponsor. It must be that the third party needs show adequate funds only for the period for which the applicant seeks leave to enter or remain and not in perpetuity. It cannot therefore be the case that if the Sponsor himself can provide this level of maintenance from his savings this support should be disallowed as not meeting the requirements of adequacy as cited in KA above, and yet allowed if it comes from a third party.

8. Permission to appeal was granted by Immigration Judge Blandy on 4th February 2011 for the reasons stated in the grounds.

Submissions

9. Both parties made brief submissions. It was agreed between them that the figures stated in the Grounds of Appeal were correct. There is an income shortfall of £125.16 per week and the Sponsor's savings would cover that shortfall for 159 weeks.

10. Mrs Brooksbank argued that the Appellant would be entitled to public funds once she had indefinite leave and she submitted that the maintenance requirements only need to be met for the initial period of leave and not for the longer term.

11. Mr Hunt-Jackson submitted that the Appellants were applying for permanent settlement and maintenance therefore needs to be capable of continuing permanently. The Appellants would be required to show at the end of the initial period of leave that they could maintain themselves adequately without recourse to public funds. It was open to the Immigration Judge to find that in this particular case the burden of proof had not been discharged.

Findings and conclusions

12. The Immigration Judge erred in law by not giving adequate reasons for declining to accept that £20,000 in savings could meet the shortfall in the Sponsor's income.

13. This application was made under paragraph 281 of HC 395. Paragraph 281 states that:

> "The requirements to be met by a person seeking leave to enter the UK with a view to settlement as the spouse or civil partner of a person present and settled in the UK or who is on the same occasion being admitted for settlement are that … inter alia, the parties will be able to maintain themselves and any dependants adequately without recourse to public funds."

14. Although Mr Hunt-Jackson submitted that the Appellants were applying for permanent settlement that is not quite accurate. They are applying for leave, which in fact will be for a period of two years, with a view to settlement.

15. In KA & Others the Tribunal held that the maintenance requirement imposes an objective standard and they rejected the submission that adequacy was a matter purely for the discretion of the Immigration Judge. The requirement of adequacy is objective and the level of income and other benefits that would be available if the family were drawing income support was held to be the yardstick.

16. The submission that the Immigration Judge was entitled to reach his own decision on adequacy without reference to any particular benchmark is not consistent with the need for some objective standard.

17. The obvious point of reference is the length of the initial leave.

18. On the other hand the argument from Mrs Brooksbank that all that was required of the Appellants was that they show that they could meet the maintenance requirements for the initial period of leave and the fact that they would be able to claim income support after they had gained permanent settlement meant that the maintenance requirement was no longer relevant cannot be right. The Rule says 'will be maintained' and looks to the future. The burden of proof lies with the Appellants to show that on the balance of probabilities they will be able to maintain themselves adequately.

19. Indeed, far from being irrelevant, at the end of the two years of the initial visa the Appellants will be required to show that the parties will be able to maintain themselves and any dependants adequately without recourse to public funds under paragraph 284(viii) of HC 395.

20. There is no requirement in the Immigration Rules that the maintenance provision can only be satisfied by the Sponsor's income. Savings have always been a relevant factor to take into account and clearly the larger the sum saved the easier it will be for the burden of proof to be discharged.

21. In Mahad the Supreme Court, which was dealing with the question of whether Appellants seeking entry to the UK were entitled to rely on third-party support in order to satisfy maintenance requirements, observed that the Rules are not to be construed with all the strictness applicable to the construction of a statute or statutory instrument but sensibly according to the natural and ordinary meaning of the words used. They noted that other forms of assistance and other funds besides the provision of accommodation were accepted to be legitimately available to the parties in satisfying the maintenance requirement, such as DLA, which the settled relative could use as he or she liked. The Court concluded that the natural meaning of the words was in effect that there was a requirement that the family would be able to cope financially.

22. The Supreme Court did not consider that the difficulty of investigation was in itself a barrier to the principle that third-party support was a factor which could be taken into account, and considered that the risk that support might be precarious was no greater than that which might arise from the ordinary vagaries and vicissitudes of life.

23. In principle therefore there is no barrier to the Sponsor having recourse to his savings in the manner suggested in the grounds.

24. The Immigration Judge appeared to accept that there would be some level at which it will be possible for the burden of proof to be discharged if the savings were sufficient. He simply did not seem to think that £20,000 was enough. But he gave no reasons for so finding. He said that there was absolutely no guarantee that the second Appellant would be able to contribute to the family income as she hoped. That is true, but the Appellants are not relying upon her income to make up the shortfall in the Sponsor's. The Immigration Judge said that the finances of the family would be extremely tight and a savings buffer would be required to avoid the need to recourse to public funds. However £20,000 covers not only the period of the initial leave but also a substantial amount to cover unforeseen eventualities.

25. On the face of it the Appellants fulfil the requirements of the Immigration Rules in that they have a sufficient income and sufficient savings to make up any shortfall for the period of the initial visa. They are on notice that when they make an application for indefinite leave to remain they will have to meet the maintenance requirements of the rules. The longer term position is not irrelevant, as Mrs Brooksbank submitted, but it is an unknown quantity. They may or may not be in a position to do so depending on a number of different factors. The first Appellant and possibly her oldest child may [or may not] at that point to be able to contribute to the household income.

26. If the Appellants are able to meet the requirements of adequacy for the period of the initial visa, and there is no reason at this stage to believe that they will not be able to meet the maintenance requirements in the longer term, then they are entitled to entry clearance.

27. There is a fundamental error in the determination not addressed either in the Grounds of Application or in the submissions. Immigration Judge Baker said that Article 8 was not engaged. He gave no reasons for so finding and it is plainly wrong. This is a subsisting family unit who clearly enjoy family together. The Immigration Judge erred in law in failing to conduct a proper exercise in determining proportionality in respect of Article 8.

28. The decision to refuse entry clearance interferes with the Appellant's right to a family life with the Sponsor their husband/father.

29. The family have sufficient resources through income and savings to maintain themselves adequately for a period of two years until they are faced with making an application for indefinite leave. There will be no recourse to public funds during that period, firstly because their resources are adequate and secondly because their level of savings is such that they would not be entitled to any public funds. In these circumstances it is hard to see what legitimate aim is sought to be achieved by their continued exclusion. The maintenance of immigration control is not a legitimate aim in itself but again, given that the Appellants meet the requirements of the Rules for an initial period after which they will be

required to show that they continue to do so, it cannot be proportionate to exclude them.

Decision

30. The Immigration Judge erred in law and his decision is set aside. It is remade as follows. The appeals are allowed under the Immigration Rules and with respect to Article 8.

Signed
Senior Immigration Judge Taylor
(Judge of the Upper Tribunal)