



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/24970/2014
IA/24967/2014
IA/14717/2015

THE IMMIGRATION ACTS

Heard at Field House
On 18 March 2016

Decision & Reasons Promulgated
On 29 April 2016

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MRS FATEHA RAHMAN
MR MANNAH RAHMAN
MISS FOUZIHA RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants Mr T Chowdhury, Solicitor, Kingdom Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Bangladesh. They applied for leave to remain in the UK as the spouse and children of the sponsor, Mr. Ataur Rahman, under paragraphs 284 and 298 respectively of the Immigration Rules. The respondent refused their applications on 3 June 2014. In respect of the lead appellant, the respondent was not satisfied that there was adequate accommodation and maintenance without access to

public funds, and that at the time of the refusal the English language test certificate and qualifications did not appear on the respondent's approved list of Providers. The respondent was not satisfied that Fouziha Rahman met the requirements of the Immigration Rules and taking into account Section 55 of the Borders, Citizenship and Immigration Act 2009, family life of all the appellants could continue in Bangladesh.

2. The appellants' appeals against the respondent's decision were dismissed by First-tier Tribunal Judge Moore in a determination promulgated on 26 August 2015. The appellants have been granted permission to appeal the judge's decision.
2. The judge found that Mrs Fateha Rahman on 17 March 2014 applied for further leave to remain in the UK as the spouse of Mr Attar Rahman under the transitional arrangements. In those circumstances the Immigration Rules that were in effect as of 5 March 2014 were relevant and effective. The judge said it was clear by reference to the definition of "public funds" in the Immigration Rules that were effective as of 5 March 2014, that tax credit and housing benefits are public fund payments, and therefore he should take such payments into account in determining the issue regarding public funds and therefore subsequent recourse to any such public funds. Consequently he found that tax credits amounting to £187.01 per week and additional housing benefit payments must mean that there would be recourse to public funds and in those circumstances the maintenance requirement under the Rules cannot be satisfied.
3. The judge added for clarity that there was no issue with regard to entitlement to claim tax credit or housing benefit, but rather, having made such claims for such benefits successfully, those payments are public funds and will be taken into account by him. In the circumstances it would appear to be the case that the appellants resided in accommodation that could only be maintained through the receipt of public funds. Therefore in the absence of such benefits the appellants would be wholly unable to maintain and accommodate themselves without access to public funds. Consequently he found that paragraph 284(vii) and (viii) of the Rules cannot be met.
4. The judge noted that Mrs. Fateha Rahman had only recently submitted an ESOL certificate which was issued on 5 March 2015, which on the face of it was an authentic award. He could not however go behind the submission made by Miss Barrow for the Home Office submitted that the respondent had not had time to undertake enquiries to ascertain whether it was on the approval list by the Secretary of State.
6. The judge found that the appellant did not meet Appendix FM, paragraph EX.1 as there were no exceptional circumstances, having taken into account all the evidence that was before him. He accepted that the lead appellant has a genuine and subsisting relationship with both her son and daughter. Both children are Bangladeshi nationals. Neither of the children has lived in the UK for more than 7

years. Master Rahman is only 4 years old and entered the UK on 28 December 2011. Miss Fouziha Rahman is 19 years old but did not enter the UK until 21 October 2012.

7. The judge's other findings in relation to paragraph 298 of the Immigration Rules, Section 55 of the Borders, Citizenship and Immigration Act 2009 and Article 8 were challenged in the grounds but permission to argue those issues was refused by Upper Tribunal Judge King.

8. UTJ King granted permission as follows:

“On the issue of maintenance under the Immigration Rules it is arguable that the issue is not whether the spouse is in receipt of public funds but whether as a result of the presence of the applicant and child such will be increased. The determination is far from clear on whether the applicant will be in receipt of public funds. The calculations did not make that clear. No findings are made on the overcrowding issue or indeed whether indeed the language certificate now complies with the Rules.

So far as matters concerning EX.2 and Article 8 I do not find any arguable error of law.”

9. Mr Chowdhury argued as he did in his grounds that ‘regarding tax credit, we submit that the parties, especially the sponsor, is entitled to tax credit and it will not be considered as public funds’.”

9. He cited Regulation 3(1) of the Tax Credits (Immigration) Regulations 2003, which says that “No person is entitled to child tax credit or working tax credit while he is a person subject to immigration control”. Mr Choudhury relied on the exception in Regulation 3(2) which states

“Where one member of a married couple or unmarried couple is a person subject to immigration control, and the other member is not ... shall, subject to paragraph (3), be determined in the same way as if that person were not subject to such control.”

10. In light of the exception in Regulation 3(2), Mr Chowdhury argued that the judge ought to have accepted that the appellant is entitled to receive public funds. He also placed reliance on paragraph 6B of the Immigration Rules which states:

“6B Subject to paragraph 6C, a person (P) shall not be regarded as having recourse to public funds and **if P is entitled to benefits specified under Section 115 of the Immigration and Asylum Act 1999 by virtue of Regulations made under subsections (3) and (4) of that Section or Section 42 of the Tax Credits Act 2002**”.

11. Mr Chowdhury submitted that by virtue of Section 42 of the Tax Credits Act 2002 the appellant is entitled to tax credit; accordingly the appellant is not having recourse to public funds as found by the judge at paragraph 26 of his judgment. If the appellant is found to have no recourse to public funds, she meets the requirements of maintenance and accommodation under the Immigration Rules and so the appeals of all three appellants should be allowed.
12. I find that Mr Chowdhury has misconstrued the Immigration Rules and the Tax Credits (Immigration) Regulations 2003. The Regulations were made by the Treasury in exercise of the powers conferred upon them by Sections 42 and 65(1), (3), (7) and (9) of the Tax Credits Act 2002(a). Regulation 3 is headed "**Exclusion of Persons subject to Immigration Control from Entitlement to Tax Credits**". Therefore Mr Chowdhury's reliance on Regulations 3(1) and (2) is misconceived because the appellants are subject to immigration control and as such they are excluded from entitlement to tax credits. Regulation 3(1) identifies five cases as exceptions to that Rule. On the evidence the appellants do not fall into any of those five exceptions.
13. Therefore under paragraph 6B of the Immigration Rules and Regulation 3 of the Tax Credits (Immigration) Regulations 2003 the appellants are excluded from claiming tax credits.
14. I accept Mr Chowdhury's argument that the sponsor, Mr Ataur, who is settled in the UK, is entitled to tax credit and that this should not be taken into account when considering the public funds element of this case. In the circumstances the issue that the judge had to consider was whether as a result of the presence of the appellants, there would be additional recourse to public funds as defined in paragraph 6A of the Immigration Rules. It was not clear from the determination that the judge considered this issue or made a finding on it. Consequently, I find that the judge erred in law.
15. As there was sufficient evidence before me, I proceeded to remake the decision.
16. Mr. Chowdhury submitted a schedule of the income of the family. Before the appellants arrived in the UK Mr Ataur Rahman was in self-employment earning £302.50 per week, amounting to £1,310.93 a month. He received housing benefit of £62 per week, amounting to £322.40 per month. This housing benefit element is public funds.
17. It appears from the schedule of total income of the sponsor and the appellant (which I presume to be the leading appellant) at the time of the hearing before the First-tier Tribunal had fallen below the sponsor's earnings prior to the arrival of the appellants. Their income was now £219.78 net per month, totalling £952.40 per month. They received tax credit in the sum of £183.16 per week, amounting to £793.70 per month and an increase in housing benefit to £85 per week amounting to £370 per month. I find that in the light of the receipt of tax credit and the increase in

housing benefit, the appellants cannot satisfy the Immigration Rules as they are not able to maintain and accommodate themselves without increased or additional recourse to public funds.

Notice of Decision

18. The appeals of the appellants are dismissed.

Signed

Date

Upper Tribunal Judge Eshun