



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: EA/03649/2021
EA/03662/2021
[UI-2021-001317; UI-2021-001319]

THE IMMIGRATION ACTS

**Heard at Field House
On 18 March 2022**

**Decision & Reasons Promulgated
On 21 June 2022**

Before

**UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE MALIK QC**

Between

**MD MONTAJ MIAH
KANCHIRUN NESSA
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation

For the Appellant: Mr Tareq Chowdhury, Solicitor, Kingdom Solicitors

For the Respondent: Mr Toby Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal from the decision of First Tier Tribunal Judge Davison (“the Judge”) promulgated on 23 August 2021. By that decision, the Judge dismissed the linked appeals brought by the Appellants from decisions

made by the Entry Clearance Officer to refuse their applications for EU Settlement Scheme Family Permits.

Background

2. The Appellants are citizens of Bangladesh and are husband and wife. They were born on 3 January 1959 and 10 June 1965 respectively.
3. The Appellants applied for EU Settlement Scheme Family Permits on 9 February 2021 to join their daughter, Mrs Chandni Begum, and son-in-law, Mr Md Saiful Islam. Mrs Begum and Mr Islam, who is a citizen of Belgium, reside in the United Kingdom. The Entry Clearance Officer refused the Appellants' applications on 25 February 2021 on the ground that there was insufficient evidence of their relationship with Mr Islam. They had provided the marriage certificate of Mrs Begum and Mr Islam. It named them as the parents of Mrs Begum. The Entry Clearance Officer, however, noted that the marriage certificate was produced without reference to the birth details. They had also provided their birth certificates, but the Entry Clearance Officer noted that those were issued 16 years after the birth. There was no evidence from the competent authorities in Bangladesh to confirm that late registration of the birth was acceptable or what evidence of birth was provided for late registration. The Entry Clearance Officer concluded that the Appellants were not family members of Mr Islam as claimed.
4. The linked appeals brought by the Appellants from the decisions made by the Entry Clearance Officer were heard by the Judge on 2 August 2021. The Judge heard oral evidence from Mr Islam and found that the Appellants were related to him as claimed. The Judge then noted that the Appellant had not provided sufficient evidence as to their financial needs and expenses, and were unable to show that they were dependent on Mr Islam. On that basis, the Judge dismissed the appeals in a decision promulgated on 23 August 2021.
5. The Appellants applied for permission to appeal from the Judge's decision on 3 September 2021. Permission to appeal was granted on 29 November 2021.

Grounds of appeal

6. The short point made in the grounds of appeal is that the Judge's decision is vitiated by a procedural impropriety. The issue of dependency was not raised by the Entry Clearance Officer in the underlying decisions and was not before the Judge. The Judge, in the circumstances, erred in law in dismissing the appeals on the basis that the Appellants were not dependent on Mr Islam.

Submissions

7. We are grateful to Mr Chowdhury, who appeared for the Appellants, and Mr Lindsay, who appeared for the Entry Clearance Officer, for their assistance and able submissions.
8. Mr Chowdhury adopted the pleaded grounds of appeal. He invited us to set aside the Judge's decision and substitute a fresh decision allowing the appeals.
9. Mr Lindsay conceded that the issue of dependency was not raised by the Entry Clearance Officer in their decision and that the Judge's decision to dismiss the appeal on that basis was wrong in law. He, however, invited us to remit the appeals for a fresh hearing below, or defer re-making of the decision, so as to provide the Entry Clearance Officer an opportunity to consider raising that issue.

Discussion

10. In our judgment, Mr Lindsay's concession is plainly correct. The issue of dependency was not raised by the Entry Clearance Officer in their decision. Contrary to what the Judge suggested at [5], it was not raised by the Appellants either; there is no trace of that issue having been raised before the Judge orally or in writing. The sole issue before the Judge concerned the relationship between the Appellants and Mr Islam. The Judge resolved that issue in favour of the Appellants. The Judge erred in law in raising the issue of dependency on his own motion in his decision. Given that the issue was not raised by the Entry Clearance Officer, it is unsurprising that the Appellants had adduced no specific evidence in relation to it. The Judge's decision to dismiss the appeals is therefore wrong in law.
11. There is no challenge by the Entry Clearance Officer to the Judge's conclusion that the Appellants are related to Mr Islam as claimed. We see no proper basis to interfere with the Judge's conclusion as to that issue.
12. Mr Lindsay, as we note above, invited us to remit the appeals for a fresh hearing below, or defer re-making of the decision, so as to provide the Entry Clearance Officer an opportunity consider raising the issue of dependency. In our judgment, this is an unattractive invitation. The Entry Clearance Officer could have raised the issue of dependency in their decisions. On receipt of the notice of appeal filed by the Appellants, the Entry Clearance Officer had another opportunity to raise that issue in their response under Rules 23-24 of the Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. The next opportunity for the Entry Clearance Officer was to seek to raise that issue at the hearing before the Judge. The Entry Clearance Officer then had another opportunity to raise that issue following the grant of permission to appeal by way of a response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In fact, on 1 February 2022, the Entry Clearance Officer filed a response but did not seek to raise the issue of dependency. Even at the hearing before us, Mr Lindsay did not seek to raise that issue.

He only sought another opportunity so to enable the Entry Clearance Officer to consider raising that issue at a future hearing. Mr Lindsay candidly accepted that the issue of dependency was not raised at any stage by the Entry Clearance Officer. He provided no explanation as to why it was not raised earlier and why it would be appropriate to give another opportunity to the Entry Clearance Officer to consider raising it.

13. Further, Paragraph 7.2 of the Senior President of the Tribunal's Practice Statement for the Immigration and Asylum Chamber provides that the Upper Tribunal, subject to two exceptions that do not apply here, is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First Tier Tribunal. Paragraph 7.3 adds that re-making rather than remitting will constitute the normal approach to determining appeals where an error of law is found. There is no good reason to depart from the Practice Statement in this instance. The Entry Clearance Officer has had numerous opportunities to raise the issue of dependency in writing, as is required by the Rules. In all the circumstances, having regard to the Overriding Objective, we do not consider it appropriate to either remit the appeals for a fresh hearing below or defer re-making of the decision on the appeals.
14. The sole issue raised by the Entry Clearance Officer, as we note above, has been resolved in favour of the Appellants. The issue of dependency is not before us. The Entry Clearance Officer, despite many opportunities, has not raised it. There is no reason as to why we should not proceed to allow the underlying appeals.

Conclusion

15. For all these reasons, we find that the Judge erred on a point of law in dismissing these appeals. We set aside the Judge's decision but preserve his unchallenged finding that the Appellants are related to Mr Islam as claimed. We re-make the decision by allowing the underlying appeals.

Notice of decision

16. The First Tier Tribunal's decision is set aside and the underlying appeals are allowed.

Anonymity order

17. The First Tier Tribunal made no anonymity order when making its decision. Likewise, having regard to the Presidential Guidance Note No 2 of 2022, *Anonymity Orders and Hearing in Private*, and the Overriding Objective, we do not consider that an anonymity order is justified in all circumstances. We therefore make no order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Fee award

18. We make fee award in the sum of £140 in each appeal in the light of our decision.

Zane Malik QC
**Deputy Judge of Upper Tribunal
Immigration and Asylum Chamber
Date: 14 April 2022**